Supreme Court, U.S.
FILED

96 821 NOV 22 1996

OFFICE OF THE CLERK

No. 96-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

THE JONATHAN WOODNER CO., THE ESTATE OF JONATHAN WOODNER, AND STEVEN Z. LAUFER,
Petitioners,

v.

FRANCISCA BREEDEN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

B. MICHAEL RAUH
MARTIN SHULMAN
MANATT, PHELPS & PHILLIPS L.L.P.
1501 M Street, N.W.
Suite 700
Washington, D.C. 20005
(202) 463-4300

Counsel for Petitioner
The Estate of Jonathan Woodner

GREGORY K. WELLS
SMALLWOOD & WELLS, P.A.
1801 McCormick Drive
Suite 160
Landover, MD 20785
(301) 925-2000

Counsel for Petitioner
Steven Z. Laufer

WALTER A. SMITH, JR.*
STEPHEN G. VASKOV
JONATHAN S. FRANKLIN
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5728

JOHN J. DILLON
MONTEDONICO, HAMILTON & ALTMAN, P.C.
5301 Wisconsin Avenue, N.W.
Suite 400
Washington, D.C. 20015
(202) 364-1434

Counsel for Petitioner
The Jonathan Woodner Co

* Counsel of Record

93 pp

QUESTION PRESENTED

Whether the court below—contrary to the majority of courts to have considered the issue—erred in holding that a *prima facie* showing of racially discriminatory jury selection under *Batson* v. *Kentucky*, 476 U.S. 79 (1986), can be overcome by counsel offering purportedly "neutral" explanations for striking all available venirepersons of one race when counsel did not apply those same reasons to strike similarly-situated jurors of another race.

PARTIES TO THE PROCEEDING

The following are the parties to the proceedings in the District of Columbia Court of Appeals:

Defendants/Appellants:

The Jonathan Woodner Company
The Estate of Jonathan Woodner
Steven Z. Laufer

Plaintiffs/Appellees:

Margaret Adams
Francisca Breeden
Muriel Cardenas
Lydia Headecker
Elise Joyner*
Archie J. McCallum
Stanley Poindexter
Winslow Spady
Clarece Walker Thame*

Pursuant to Supreme Court Rule 29.6, petitioner The Jonathan Woodner Company states that its parent company is the Shipley Corporation and that it has no non-wholly owned subsidiaries.

---

* The claims of Ms. Joyner and Ms. Thame were settled during the proceedings in the Court of Appeals and these individuals are therefore not parties to the proceedings in this Court.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
A. COUNSEL'S CREATION OF AN ALL-BLACK JURY	3
B. COUNSEL'S CHARGES OF RACISM BEFORE THE ALL-BLACK JURY	5
C. THE TRIAL COURT'S POST-TRIAL RULING	6
D. THE COURT OF APPEALS' RULING	7
REASONS FOR GRANTING THE WRIT	8
I. THE LOWER COURTS ARE IN CONFLICT OVER THE PROPER USE OF COMPARATIVE ANALYSIS UNDER *BATSON*	9
A. THE *PER SE* RULE	9
B. COMPARATIVE ANALYSIS AS A CRITICAL FACTOR IN DETERMINING PRETEXT	10
C. THE REJECTION OF COMPARATIVE ANALYSIS	13
D. THE RECOGNITION OF THE CONFLICT	14

TABLE OF CONTENTS—Continued

Page

II. THE QUESTION PRESENTED IS IMPORTANT 16

III. THIS CASE PRESENTS COMPELLING CIRCUMSTANCES FOR RESOLVING THE QUESTION PRESENTED 18

CONCLUSION 20

APPENDICES

Appendix A:

Opinion of the District of Columbia Court of Appeals (September 14, 1995) 1a

Appendix B:

Memorandum of Decision and Order of the District of Columbia Superior Court (March 23, 1990) 28a

Appendix C:

Transcript of Ruling of the District of Columbia Superior Court (February 29, 1989) 58a

Appendix D:

Order of the District of Columbia Court of Appeals Granting Panel Rehearing in Part and Denying Rehearing En Banc (July 25, 1996) 62a

TABLE OF AUTHORITIES

Page

CASES:

Batson v. *Kentucky*, 476 U.S. 79 (1986) ..... *passim*

Burks v. *Borg*, 27 F.3d 1424 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1122 (1995) ..... *passim*

Burton v. *Wilmington Parking Authority*, 365 U.S. 715 (1961) 17

Davidson v. *Harris*, 30 F.3d 963 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 737 (1995) 9

Dedeaux v. *J.I. Case Co.*, 611 So.2d 880 (Miss. 1992) 12

Devose v. *Norris*, 53 F.3d 201 (8th Cir. 1995) 9

Doss v. *Frontenac*, 14 F.3d 1313 (8th Cir. 1994) 10

Edmonson v. *Leesville Concrete Co.*, 500 U.S. 614 (1991) 2, 16, 17, 19

Emerson v. *State*, 851 S.W.2d 269 (Tex. Crim. App. 1993) 11

Ex Parte Sockwell, 675 So.2d 38 (Ala. 1995), *cert. denied*, 117 S. Ct. 115 (1996) 12

Files v. *State*, 613 So.2d 1301 (Fla. 1992) 12

Ford v. *State*, 423 S.E.2d 245 (Ga. 1992) 11

Garrett v. *Morris*, 815 F.2d 509 (8th Cir.), *cert. denied*, 484 U.S. 898 (1987) 10

Georgia v. *McCollum*, 505 U.S. 42 (1992) 18

Hernandez v. *New York*, 500 U.S. 352 (1991) 18

Hollingsworth v. *Burton*, 30 F.3d 109 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 944 (1995) 11, 12

J.E.B. v. *Alabama*, 114 S. Ct. 1419 (1994) 17

Jones v. *Ryan*, 987 F.2d 960 (3d Cir. 1993) 10

Lovejoy v. *United States*, 92 F.3d 628 (8th Cir. 1996) ... 10

Norris v. *Alabama*, 294 U.S. 587 (1935) 18

TABLE OF AUTHORITIES—Continued

Page

People v. *Andrews*, 614 N.E.2d 1184 (Ill. 1993) 11, 12

People v. *Dunn*, 40 Cal. App. 4th 1039, 47 Cal. Rptr. 638 (Cal. Ct. App. 1995), *cert. denied*, 116 S. Ct. 2559 (1996) 14

People v. *Johnson*, 767 P.2d 1047 (Cal. 1989), *cert. denied*, 494 U.S. 1038 (1990) 13, 14

People v. *Trevino*, 704 P.2d 719 (Cal. 1985) 13, 15

People v. *Turner*, 878 P.2d 521 (Cal. 1994), *cert. denied*, 115 S. Ct. 1702 (1995) 13

Powers v. *Ohio*, 499 U.S. 400 (1991) 16, 17, 19

Purkett v. *Elem*, 115 S. Ct. 1769 (1995) 17, 18

Reynolds v. *Benefield*, 931 F.2d 506 (8th Cir.), *cert. denied*, 501 U.S. 1204 (1991) 9, 10

State v. *Collier*, 553 So.2d 815 (La. 1989) 11, 12

State v. *Gilmore*, 511 A.2d 1150 (N.J. 1986) 10

State v. *Slappy*, 522 So.2d 18 (Fla.), *cert. denied*, 487 U.S. 1219 (1988) 12

State v. *Walston*, 886 P.2d 349 (Kan. 1994) 11

State v. *Weaver*, 912 S.W.2d 499 (Mo. 1995), *cert. denied*, 117 S. Ct. 153 (1996) 11

United States v. *Alvarado*, 923 F.2d 253 (2d Cir. 1991) 11

United States v. *Chinchilla*, 874 F.2d 695 (9th Cir. 1989) 15

United States v. *Jenkins*, 52 F.3d 743 (8th Cir. 1995) 10

United States v. *Kunzman*, 54 F.3d 1522 (10th Cir. 1995) 14

United States v. *Lewis*, 892 F.2d 735 (8th Cir. 1989) 10

United States v. *McMillon*, 14 F.3d 948 (4th Cir. 1994) 11

TABLE OF AUTHORITIES—Continued

	Page
United States v. *Scott*, 26 F.3d 1458 (8th Cir.), *cert. denied*, 115 S. Ct. 584 (1994)	9
United States v. *Stewart*, 65 F.3d 918 (11th Cir. 1995), *cert. denied*, 116 S. Ct. 958 (1996)	12
Walton v. *Caspari*, 916 F.2d 1352 (8th Cir. 1990), *cert. denied*, 499 U.S. 931 (1991)	10
CONSTITUTIONAL PROVISION:	
U.S. Const., Amend. V	2
STATUTE:	
28 U.S.C. § 1257(a)	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-

THE JONATHAN WOODNER CO., THE ESTATE OF JONATHAN WOODNER, AND STEVEN Z. LAUFER,

Petitioners,

v.

FRANCISCA BREEDEN, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

---

PETITION FOR A WRIT OF CERTIORARI

The Jonathan Woodner Company, the Estate of Jonathan Woodner, and Steven Z. Laufer petition this Court for a writ of certiorari to review the judgment of the District of Columbia Court of Appeals entered September 14, 1995.

OPINIONS BELOW

The opinion of the Court of Appeals affirming the trial court's judgment in part and reversing in part is reported at 665 A.2d 929 and is reproduced in the appendix to this petition ("App.") at 1a. The order of the Court of Appeals granting panel rehearing in part and denying rehearing en banc is reported at 681 A.2d 1097 and is reproduced at App. 62a. The order of the trial court denying petitioners' motions for judgment notwithstand-

ing the verdict or new trial is unreported and is reproduced at App. 28a.

JURISDICTION

The judgment of the Court of Appeals affirming the trial court's judgment in part and reversing in part was entered on September 14, 1995. That court's order granting panel rehearing in part and denying rehearing en banc was issued on July 25, 1996. On October 14, 1996, Chief Justice Rehnquist issued an order extending until November 22, 1996 petitioners' time to file a petition for a writ of certiorari to review the September 14, 1995 judgment. The jurisdiction of this Court to review that judgment is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part, "nor shall any person . . . be deprived of life, liberty, or property, without due process of law."[1]

STATEMENT OF THE CASE

This case presents compelling circumstances for resolving the considerable division and confusion among the lower courts over an important and recurring question of law: whether a *prima facie* case of racial discrimination under *Batson* v. *Kentucky*, 476 U.S. 79 (1986), can be overcome solely through purportedly "neutral" explanations for striking venirepersons of one race that counsel did not apply to strike similarly-situated jurors of another race. The Court of Appeals—in conflict with the majority of courts to have considered

---

[1] Because this case comes from the District of Columbia, it arises under the equal protection component of the Fifth Amendment's Due Process Clause, which incorporates the requirements of the Fourteenth Amendment applied in *Batson* v. *Kentucky*, 476 U.S. 79 (1986). *See Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614, 616 (1991).

the issue—held that it was appropriate for the trial court to have ignored such comparative evidence entirely in determining whether *Batson* was violated. And it reached that result notwithstanding that plaintiffs' counsel used his peremptory strikes to remove all whites from the jury, that he did so in a case where racial tensions and passions were expected to run high, and that he did so to create an all-black jury to hear a case of all-black plaintiffs against all-white defendants. Because the proper analysis of such peremptory strikes is a frequently occurring issue that has divided the lower courts, and because resolution of this issue is crucial to fair, uniform administration of justice in those courts, certiorari is warranted in this case.

A. Counsel's Creation of an All-Black Jury

This case involves a dispute between a group of black plaintiffs (respondents in this Court) and a group of white defendants (petitioners in this Court).[2] Respondents, former tenants in an apartment building in the District of Columbia, sued petitioners, the managers of the building, on a variety of tort theories predicated on the conditions in the building. The present petition arises because respondents' counsel ("counsel") chose to make race and racism a central issue in what should have been a straightforward landlord-tenant dispute, and because the court below failed in its duty to ensure proceedings free of racial prejudice.

To use race to his advantage, counsel methodically struck all white venirepersons to create an all-black primary jury. Thus, during jury selection, counsel used his first two peremptory challenges to strike the only two prospective white jurors from the primary venire. *See* Feb. 23, 1989 (10:00 a.m.) Tr. at 8, 9 (R. KK). Having

---

[2] Although the trial court described the plaintiffs as "nine black tenants," App. 31a, one of the respondents is in fact Hispanic. *See* Feb. 27, 1989 (1:37 p.m.) Transcript ("Tr.") at 13. This fact does not affect the analysis of the issues presented in this petition.

thereby created an all-black primary jury, counsel then used his first two peremptory challenges to strike whites from the panel of alternate jurors. *Id.* at 11.[3]

Petitioners repeatedly objected to these ostensibly discriminatory strikes under *Batson*. Significantly, in ruling on this objection at the time of jury selection, the trial court found that counsel's behavior "certainly is a prima faci[e] showing of a racist exercise of peremptory challenge[s]," and therefore determined that counsel had the burden of providing neutral explanations for his behavior. App. 61a. Counsel's explanations were that he had struck the two white jurors from the primary venire because both had expressed concerns about their work responsibilities. *See* Feb. 23, 1989 (10:00 a.m.) Tr. at 9 (R. KK). He also explained that in addition to using "hunches and intuition," he had struck venirepersons whom he believed would not be "sensitive to the concerns" of respondents. *Id.* at 9-10.

The trial court, however, expressly determined that four out of the twelve persons in the primary-jury panel—two whites and two blacks—had indicated that they had job related concerns; that another black member of the panel had a school commitment; and that three other black persons had indicated school hardship. App. 59a. The trial court further found that the job

---

[3] The six alternate jurors eventually included one white, who was not challenged by any party. *Id.* at 10. This alternate, however, was the fifth in line and in fact did not serve on the jury. *Id.* at 47; App. 32a n.2. Indeed, counsel ensured that she would not serve by successfully arguing that permitting alternates to deliberate with the primary jury was "prejudicial" because counsel had "couch[ed] . . . our case to the extent we could to the six primary jurors based on what we know about them" and had specifically "direct[ed] our opening argument primarily at those six persons seeking to develop what rapport we could with them." Mar. 17, 1989 (9:25 a.m.) Tr. at 7-8 (R. JJJJ). As noted below, counsel "couched his case" to, and developed that "rapport" with, the all-black primary jury in part by repeatedly accusing petitioners of being racists.

related concerns of one of the challenged whites and one of the unchallenged blacks were similar. *Id.* at 60a. In light of counsel's failure to challenge similarly-situated blacks, the court stated that it was "hard pressed to find an explanation other than race," and therefore concluded that "the neutrality of [counsel's] explanation as based purely on the job [was] quite thin." *Id.* Nevertheless, "trust[ing] counsel's integrity" and accepting his employment explanation "as an officer of the Court," the trial court sustained the peremptory challenges. *Id.* at 61a.[4]

B. Counsel's Charges of Racism Before the All-Black Jury

Having thus successfully empaneled an all-black jury, respondents' counsel proceeded to make repeated, unfounded charges of racism in front of that jury against the all-white petitioners. And he did so, even though as the trial court found, this was "a case in which passions could run high," and "[t]he trial of this case included racial tension and racial issues." App. 35a, 31a.

The gravamen of respondents' case was that petitioners, in order to force respondents to leave their apartment building so that it could be converted to condominiums, had harassed them and deliberately allowed conditions in the building to deteriorate. Counsel, however, transformed the dispute into one about race, arguing to the all-black jury that racism had motivated the white petitioners against the black respondents.

Thus, even though he never adduced evidence to justify his charges, at several points in his opening

---

[4] In its initial ruling, the court alluded vaguely to "some difference" in the quality of the job concerns expressed by the white venirepersons who were struck and the black jurors who were not, stating that this provided "a slim factual margin that favors the neutral explanation." App. 60a, 61a. The court, however, nowhere explained what that purported difference was.

statement counsel alleged that petitioners' actions were motivated by "racism," and then alleged that plaintiffs

> were receiving the 21st century [sic] equivalent of a lynching, remind[ing them] of treatment of blacks in the south when they attempted to stand up for their rights, the cattle prods, the dogs, the bestiality in which they were treated .... [T]hey were being ... lynched in effect.

February 23, 1989 (10:00 a.m.) Tr. at 23 (R. II). *See also id.* at 6-7, 16, 23 (describing petitioners as having been motivated by "greed," "money," and "racism"); App. 33a-34a.[5] Counsel then repeated his inflammatory accusations to the all-black jury in his closing argument, once again asserting that petitioners had been motivated by "racial insensitivity" and specifically urging the jury to award damages on this basis. *See* Mar. 20, 1989 (9:40 a.m.) Tr. at 36, 40-41 (R. LLLL).

C. The Trial Court's Post-Trial Ruling

The jury responded by awarding the nine plaintiffs approximately $1,000,000 in compensatory damages and $15,000,000 in punitive damages, the latter being the largest punitive award ever adjudged in the local courts of the District of Columbia. Renewing objections made at trial, petitioners moved to set aside these verdicts because counsel had improperly created an all-black jury to which to make his racially-based appeals.

In ruling on the renewed motions nearly a year later, the trial court reversed its previous *Batson* ruling in one respect, acknowledging that "an affirmation of good faith in exercising peremptory challenges *does not*

---

[5] Counsel's racial insinuations were not limited to petitioners themselves. Counsel for one of the petitioners is black, and during trial respondents' counsel suggested before the jury that this individual was made a name partner of his law firm and then entered his appearance in this case solely because of his race. *See* Apr. 18, 1989 (1:45 p.m.) Tr. at 54 (R. YYYY).

suffice as a neutral explanation." App. 32a (emphasis supplied). *See Batson*, 476 U.S. at 98 ("Nor may the prosecutor rebut the defendant's case merely by denying that he had discriminatory motive or 'affirm[ing] [his] good faith in making individual selections.'") (citation omitted). The court nevertheless upheld counsel's strikes, stating that counsel's assertion that he had struck persons with "serious job conflicts or concerns" met his burden to provide a neutral explanation. "Such persons," the court reasoned, "might be distracted" by a case which "involved rather petty human behavior involving landlords and tenants." App. 33a. Importantly, however, the court *nowhere* addressed counsel's failure to strike black jurors that the court itself had found to be similarly-situated; nor did it explain why such jurors would not be similarly "distracted."

D. The Court of Appeals' Ruling

Petitioners appealed the trial court's judgment, renewing these objections among others. In an opinion and judgment issued on September 14, 1995, the Court of Appeals affirmed certain of the compensatory-damages awards, reversed other compensatory awards, and remanded for a new trial on punitive damages alone. *See* App. 27a.

Yet notwithstanding extensive briefing and argument on the issues, the court, in a single footnote, rejected petitioners' contention that the compensatory and punitive damages verdicts must both be reversed in light of counsel's unjustified exclusion of all whites from the primary jury and his repeated appeals based on race before the resulting all-black panel. The court affirmed the trial court's post-trial rulings, holding summarily that "[b]ecause there is record support for the trial judge's findings that the tenants did not use peremptory challenges in a racially discriminatory manner, and that, while race was an issue, the case was presented to the jury in 'a reasonable manner . . . and race was not exploited improperly,' we will not disturb those findings

on this appeal." App. 6a n.5 (citations omitted). The court, however, never identified the "record support" for the trial court's findings; nor did it explain how counsel could overcome a *prima facie* showing of discriminatory jury selection on the basis of a purportedly "neutral" rationale that was not applied to strike similarly-situated black jurors.

REASONS FOR GRANTING THE WRIT

The Court should review the *Batson* issue presented by this case for three reasons. First, as explained below, the split among the lower courts on the question presented is persistent and irreconcilable. Indeed, as Judge Kozinski noted when describing the conflict between the Ninth Circuit and the California Supreme Court on this issue, "[t]he U.S. Supreme Court has not yet ruled on the role of comparative analysis on appellate review, so no one is quite sure whether our circuit or the California Supreme Court is right." *Burks* v. *Borg*, 27 F.3d 1424, 1427 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1122 (1995).

Second, the issue presented is an important and recurring one in the lower courts. Indeed, the issue is vitally important to this Court's goal of eliminating discrimination in jury selection in the Nation's courts, particularly in racially charged cases such as this one. If, as occurred below, courts may simply ignore evidence that a facially neutral explanation for peremptory strikes was applied only to members of one race, then litigants may often be completely unable to challenge that explanation. Given the ease with which counsel can formulate seemingly neutral explanations for discriminatory behavior, comparative evidence may often be the only way to expose such tactics.

Finally, this case both underscores the importance of the issue and presents a compelling vehicle for resolving it. Where, as here, counsel creates a one-race jury, inflames that jury with appeals based on race, and obtains an enormous damages award, it is all the more

important that courts conduct a careful review of jury selection to ensure that racial prejudice played no role in the outcome of the case.

I. THE LOWER COURTS ARE IN CONFLICT OVER THE PROPER USE OF COMPARATIVE ANALYSIS UNDER *BATSON*

There can be no question that the lower courts, both federal and state, are deeply divided over the proper use of a comparative analysis under *Batson*. That conflict has only been deepening in the decade since *Batson*, and will continue to persist until resolved by this Court.

A. The *Per Se* Rule

At one end of the spectrum are courts holding that where a *prima facie* case of discrimination has been shown, counsel's explanation is *per se* pretextual where the purportedly neutral criteria upon which counsel claims to have stricken members of one race were not applied to strike members of another race.

The Eighth Circuit is the leading proponent of this view. As that court has held:

> "'[I]n this circuit, it is well established that [a litigant] may not justify peremptory challenges to venire members of one race unless venire members of another race with comparable or similar characteristics are also challenged.'" *United States* v. *Scott*, 26 F.3d 1458, 1466 (8th Cir. 1994) (quoting *Reynolds* v. *Benefield*, 931 F.2d 506, 512 (8th Cir.), *cert. denied*, 501 U.S. 1204 (1991)). A party can establish an otherwise neutral explanation is pretextual by showing that the characteristics of a stricken black panel member are shared by white panel members who were not stricken.

Davidson v. *Harris*, 30 F.3d 963, 965 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 737 (1995) (additional citations omitted). *See also Devose* v. *Norris*, 53 F.3d 201, 204 (8th Cir. 1995) ("Because the government failed to

establish 'that any reason given for its exercise of strikes against black jurors had been equally applied to similarly situated white jurors,' we are left with the inescapable conclusion that the prosecutor's rationale for excluding black prospective jurors . . . was pretextual") (quoting *Reynolds*, 931 F.2d at 512).[6]

This view is shared by the Third Circuit and by the New Jersey Supreme Court. Thus, in *Jones* v. *Ryan*, 987 F.2d 960 (3d Cir. 1993), the court held that

> The prosecutor's explanation . . . does not satisfy the concerns of *Batson*. The record reveals that the prosecutor did not apply [his] general policy to two white venirepersons who possessed the identical characteristic . . . . The presence of white jurors who possessed the same characteristic indicates that this explanation is pretextual.

Id. at 973. Likewise, in *State* v. *Gilmore*, 511 A.2d 1150 (N.J. 1986), the court found it "highly probative" that counsel "fail[ed] to exercise peremptory challenges to remove white prospective jurors who by his own criteria ought to have been removed" and concluded on the basis of this evidence that "[t]he only real difference between the two black women and the six white women was their race." *Id.* at 1168.

B. Comparative Analysis as a Critical Factor in Determining Pretext

A number of courts reject a *per se* rule, holding that evidence of disparate treatment is a critical, but not necessarily dispositive, factor both the trial and appellate

---

[6] *Accord*, *Lovejoy* v. *United States*, 92 F.3d 628, 631 (8th Cir. 1996); *United States* v. *Jenkins*, 52 F.3d 743, 747 (8th Cir. 1995); *Doss* v. *Frontenac*, 14 F.3d 1313, 1316-17 (8th Cir. 1994); *Walton* v. *Caspari*, 916 F.2d 1352, 1361-62 (8th Cir. 1990), *cert. denied*, 499 U.S. 931 (1991); *United States* v. *Lewis*, 892 F.2d 735, 736-37 (8th Cir. 1989); *Garrett* v. *Morris*, 815 F.2d 509, 514 (8th Cir.), *cert. denied*, 484 U.S. 898 (1987).

courts must consider in evaluating counsel's explanation.

For example, in *United States* v. *Alvarado*, 923 F.2d 253 (2d Cir. 1991), the Second Circuit held that "[t]he relative plausibility or implausibility of each explanation for a particular challenge, assessed in light of the prosecution's acceptance of jurors with similar circumstances, may strengthen or weaken the assessment of the prosecution's explanation . . . ." *Id.* at 256.[7] Numerous state courts follow this approach. Thus, in *State* v. *Walston*, 886 P.2d 349 (Kan. 1994), the Kansas Supreme Court, disapproving of a prior opinion indicating a *per se* approach, held that a prosecutor's failure to strike venirepersons of one race with the same characteristics purportedly used to strike members of another race "is certainly *circumstantial* evidence that the State is purposefully discriminating" but "should not be considered conclusive in every case, as a matter of law." *Id.* at 355 (emphasis in original).[8]

---

[7] *See also Hollingsworth* v. *Burton*, 30 F.3d 109, 112 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 944 (1995); *Burks*, 27 F.3d at 1427; *cf. United States* v. *McMillon*, 14 F.3d 948, 954 n.5 (4th Cir. 1994) (noting that Eighth Circuit rule is "not the law of this circuit," but declining to reach issue on facts of that case).

[8] *See also State* v. *Weaver*, 912 S.W.2d 499, 509 (Mo. 1995) (en banc) ("crucial to the analysis is whether similarly situated white venirepersons escaped the state's challenge"), *cert. denied*, 117 S. Ct. 153 (1996) (citation omitted); *Emerson* v. *State*, 851 S.W.2d 269, 274 (Tex. Crim. App. 1993) (en banc) ("[a]n explanation for striking a prospective minority juror is also suspect when the state does not strike persons with the same or similar characteristics"); *People* v. *Andrews*, 614 N.E.2d 1184, 1189-90 (Ill. 1993); *State* v. *Collier*, 553 So.2d 815, 822 (La. 1989) (finding pretext based on inconsistent application of stated rationale, but noting that "the fact that a prosecutor excuses one person with a particular characteristic . . . and not another similarly situated person does not in itself show that the prosecutor's explanation was a mere pretext for discrimination"); *Ford* v. *State*, 423 S.E.2d 245, 247 n.1 (Ga. 1992) ("A prosecutor's failure to explain the apparently disparate treatment of similarly situated white and black jurors certainly diminishes the force of his explanation for striking a

These courts generally hold that inconsistent treatment of seated jurors and struck venirepersons compels a finding of pretext absent other credible reasons for distinguishing the seated jurors. Thus, in *Hollingsworth* v. *Burton*, 30 F.3d 109 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 944 (1995), the Eleventh Circuit held that although a seated white juror possessed characteristics purportedly used to strike a black venireperson, a "careful comparison" of the two showed that the "white juror . . . would appear to be slightly preferable from the perspective of the prosecution to [the] black juror . . ., regardless of race." *Id.* at 113. *Accord*, *United States* v. *Stewart*, 65 F.3d 918, 926 (11th Cir. 1995), *cert. denied*, 116 S. Ct. 958 (1996). Similarly, in *Ex Parte Sockwell*, 675 So.2d 38 (Ala. 1995), *cert. denied*, 117 S. Ct. 115 (1996), the Alabama Supreme Court rejected a *Batson* challenge where seated white jurors possessing the negative characteristics purportedly used to strike black venirepersons (criminal records) exhibited favorable traits that could "counterbalance" the negative ones. *Id.* at 41. And in *State* v. *Collier*, 553 So.2d 815 (La. 1989), the Louisiana Supreme Court, although finding pretext on the basis of a comparative analysis, held that such evidence does not necessarily show pretext because "[t]he accepted juror may have exhibited traits which the prosecutor could have reasonably believed would make him desirable as a juror." *Id.* at 822. *See also People* v. *Andrews*, 614 N.E.2d 1184, 1189-90 (Ill. 1993).[9]

---

black juror"); *Files* v. *State*, 613 So.2d 1301, 1303, 1304 (Fla. 1992) ("'a challenge based on reasons equally applicable to juror[s] who were not challenged'" is among the factors that "will *tend* to show that the state's reasons are not actually supported by the record or are an impermissible pretext") (quoting *State* v. *Slappy*, 522 So.2d 18, 22 (Fla.), *cert. denied*, 487 U.S. 1219 (1988)) (emphasis in original); *Dedeaux* v. *J.I. Case Co.*, 611 So.2d 880, 884 (Miss. 1992).

[9] Many of the courts adopting this approach apparently permit a reviewing court to scrutinize the record for other distinguishing characteristics regardless of whether counsel actually articulated those distinctions below.

C. The Rejection of Comparative Analysis

At the other end of the spectrum are courts—like the Court of Appeals in this case—which hold that comparative evidence may simply be ignored. The leading proponent of this view is the California Supreme Court, as set forth in *People* v. *Johnson*, 767 P.2d 1047, 1056-57 (Cal. 1989) (in bank), *cert. denied*, 494 U.S. 1038 (1990). In *Johnson*, the court—overruling its previous decision in *People* v. *Trevino*, 704 P.2d 719 (Cal. 1985)—rejected the use of comparative analysis entirely. The court held that any comparison of seated jurors with struck venirepersons "is one-sided since it ignores the characteristics of the other . . . jurors against whom the prosecutor also exercised peremptory challenges," and added that "we fail to see how a trial judge can reasonably be expected to make such detailed comparisons mid-trial." 767 P.2d at 1056.

Thus, according to the California Supreme Court,

> use of a comparison analysis to evaluate the bona fides of the prosecutor's stated reasons for peremptory challenges does not properly take into account the variety of factors and considerations that go into a lawyer's decision to select certain jurors while challenging others that appear to be similar.

Id. See also id. at 1057 ("the very dynamics of the jury selection process make it difficult, if not impossible, on a cold record, to evaluate or compare the peremptory challenge of one juror with the retention of another juror which on paper appears to be substantially similar"). The court added that "we have no reason to believe that prosecutors will not fulfill their duty to exercise their peremptory challenges only for legitimate purposes." *Id. Accord People* v. *Turner*, 878 P.2d 521, 537 (Cal. 1994) (in bank), *cert. denied*, 115 S. Ct. 1702 (1995).[10]

---

[10] Subsequent opinions from other courts have indicated that *Johnson*, while foreclosing an appellate court from engaging in a comparative analysis, does not preclude a trial court from doing

This view is also shared by the Tenth Circuit. In *United States* v. *Kunzman*, 54 F.3d 1522 (10th Cir. 1995), the defendant had argued that a prosecutor's purportedly neutral criteria for strikes against black venirepersons was pretextual because the prosecutor had failed to strike white jurors possessing the same characteristics. The court, relying entirely on the trial judge's ability to observe the "demeanor and credibility" of the prosecutor, held simply that the defendant's evidence "is insufficient to demonstrate that the district court's ruling was clearly erroneous." *Id.* at 1529.

This is the same approach adopted by the Court of Appeals in this case. Notwithstanding undisputed evidence that respondents' counsel applied his purportedly "neutral" criteria to members of only one race, and notwithstanding both counsel's and the trial court's failure to explain that disparate treatment in any way, the Court of Appeals deferred to the trial court's determination without engaging in *any* comparative analysis. Accordingly, like state trial judges in California and federal trial judges in the Tenth Circuit, trial judges in the District of Columbia are now free to accept counsel's rationale without even attempting to explain the apparent failure to apply that rationale in an evenhanded, race-neutral manner.

D. The Recognition of the Conflict

The Ninth Circuit, in *Burks* v. *Borg*, 27 F.3d 1424 (9th Cir. 1994), *cert. denied*, 115 U.S. 1122 (1995), expressly recognized the existence of the irreconcilable conflict in the lower courts on this issue. In that case, a defendant

---

so. *See Burks*, 27 F.3d at 1427; *People* v. *Dunn*, 40 Cal. App. 4th 1039, 1050, 47 Cal. Rptr. 638, 646 (Cal. Ct. App. 1995), *cert. denied*, 116 S. Ct. 2559 (1996). But as noted, the *Johnson* court stated that it could not see "how a trial judge can reasonably be expected to make such detailed comparisons mid-trial," 767 P.2d at 1056, and its abdication of appellate review on the issue indicates that state trial judges in California are free to ignore comparative evidence.

who had been convicted in the California state courts raised a *Batson* claim in a federal habeas petition. Writing for the court, Judge Kozinski noted that the Ninth Circuit, in *United States* v. *Chinchilla*, 874 F.2d 695 (9th Cir. 1989), had endorsed the use of comparative analysis at the appellate level, while the California Supreme Court in *Johnson* had rejected such review. *See Burks*, 27 F.3d at 1427. In light of this conflict, Judge Kozinski recognized that "[t]he U.S. Supreme Court has not yet ruled on the role of comparative analysis on appellate review, so no one is quite sure whether our circuit or the California Supreme Court is right." *Id.*

The *Burks* court also recognized one of the intolerable consequences of this conflict. As the court noted, because *Johnson*'s abdication of comparative analysis is considered inadequate under the law of the Ninth Circuit, that inadequacy arguably undermines the presumption of correctness accorded a trial court's factual findings on federal habeas review. *Id.* at 1428. As the court then explained,

> Such a rule would create an odd discontinuity in the law applicable to habeas petitions raising *Batson* claims—at least until the U.S. Supreme Court resolves the comparative analysis issue. California appellate courts are, of course, bound by *Johnson*, which precludes comparative analysis. When the case comes to federal court in this circuit, however, the issue is governed by *Chinchilla*.

Id. at 1428 n.2 (citations omitted). Thus, due to the split among the state and federal courts on this question, a conviction affirmed by the state court under its interpretation of *Batson* could nevertheless be overturned by the federal court applying its contrary interpretation.

The court in *Burks*, however, held that it "need not resolve this intriguing issue" because the state trial judge had made his findings when the California courts were still governed by the rule in *People* v. *Trevino*, *supra*—which had strongly endorsed comparative analysis and

was only later overruled in *Johnson*—and because even under the law of the Ninth Circuit the trial judge's findings would not be disturbed on habeas review. *Burks*, 27 F.3d at 1428-29.

In this case, by contrast, the conflict is squarely presented. Had this case been tried in the Eighth Circuit or another jurisdiction that follows the *per se* approach, a new trial would clearly have been required in light of counsel's failure to apply his stated rationale to potential jurors of all races. The same result would have occurred had the case been tried in a jurisdiction where such disparate treatment is considered presumptive evidence of pretext, because the record demonstrates no other basis for distinguishing the stricken white venirepersons from the seated black jurors.

The uncertainty recognized in *Burks* should not be allowed to persist any longer. The content of the constitutional right upheld in *Batson* should not depend on which jurisdiction a litigant happens to find him or herself. Accordingly, the Court should resolve this longstanding conflict and restore "the clarity of this Court's commands to eliminate the taint of racial discrimination in the administration of justice." *Powers* v. *Ohio*, 499 U.S. 400, 402 (1991).

II. THE QUESTION PRESENTED IS IMPORTANT

There can be no doubt as to the importance of the right vindicated in *Batson*, which continued "over a century of jurisprudence dedicated to the elimination of race prejudice within the jury selection process." *Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614, 618 (1991). Indeed, discrimination in jury selection "constitutes a primary example of the evil the Fourteenth Amendment was designed to cure." *Batson*, 476 U.S. at 85.

Combating this discrimination, moreover, is not merely a concern of the individual litigants and jurors. Rather, "[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the

excluded juror to touch the entire community." *Id.* at 87. It is also a fundamental concern of courts themselves. For "[b]y enforcing a discriminatory peremptory challenge, the court 'has not only made itself a party to the [biased act], but has elected to place its power, property and prestige behind the [alleged] discrimination,'" and "in a significant way has involved itself with invidious discrimination." *Edmonson*, 500 U.S. at 624 (quoting *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 725 (1961)).

Thus, "public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race." *Batson*, 476 U.S. at 99. As the Court has noted:

> Equal opportunity to participate in the fair administration of justice is fundamental to our democratic system. It not only furthers the goals of the jury system. It reaffirms the promise of equality under the law—that all citizens, regardless of race, ethnicity, or gender, have the chance to take part directly in our democracy. When persons are excluded from participation in our democratic processes solely because of race or gender, this promise of equality dims, and the integrity of our judicial system is jeopardized.

J.E.B. v. *Alabama*, 114 S. Ct. 1419, 1430 (1994) (citation omitted).

There is also no doubt that resolution of the question presented by this petition is critical to the proper application of *Batson* in the lower courts. In the decade since *Batson* was decided, this Court has focused on delineating who is protected by that right and in what types of cases. *See J.E.B.*, *supra*; *Georgia* v. *McCollum*, 505 U.S. 42 (1992); *Edmonson*, *supra*; *Powers*, *supra*. The Court has also ruled on what constitutes a facially neutral explanation under *Batson*, *see Purkett* v. *Elem*, 115 S. Ct. 1769 (1995), and has set forth the appellate standard of review in reviewing pretext determinations. *See Hernandez* v. *New York*, 500 U.S. 352, 362-69

(1991). But the Court has not yet provided any guidance on the factors that must be considered (or that can be ignored) in the pretext analysis, resulting in the conflict giving rise to this petition.

The unresolved question presented here is no less important than the questions this Court has previously considered. In *Purkett*, the Court recently ruled that the second step in the *Batson* inquiry "does not demand an explanation that is persuasive, or even plausible." 115 S. Ct. at 1771. Thus, given the summary nature of *Batson* hearings, which do not permit discovery or even cross-examination, if courts may simply ignore evidence of counsel's disparate treatment of seated jurors and struck venirepersons, then litigants will often be left with no way to challenge such explanations and no fair opportunity to demonstrate the resulting unconstitutional discrimination. Under that approach, "the Equal Protection Clause 'would be but a vain and illusory requirement.'" *Batson*, 476 U.S. at 98 (quoting *Norris* v. *Alabama*, 294 U.S. 587, 598 (1935)).

Accordingly, the critical nature of the comparative-analysis inquiry and the frequency with which this issue has recurred in the lower courts (*see supra* at 9-16) demonstrates the importance of the question presented.

III. THIS CASE PRESENTS COMPELLING CIRCUMSTANCES FOR RESOLVING THE QUESTION PRESENTED

Finally, this case is plainly a compelling one for resolving the question presented. For in this case, which involved "racial tension and racial issues," App. 31a, the discrimination in the jury selection casts serious doubt on the fundamental fairness of the entire proceedings.

This Court has emphasized that "[r]ace discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there." *Edmonson*, 500 U.S. at 628. As the Court has noted, discrimination in jury selection "invites cynicism

respecting the jury's neutrality and its obligation to adhere to the law," a cynicism that "may be aggravated if race is implicated in the trial, either in a direct way as with an alleged racial motivation of the defendant or a victim, or in some more subtle manner as by casting doubt upon the credibility or dignity of a witness, or even upon the standing or due regard of an attorney who appears in the case." *Powers*, 499 U.S. at 412.

All of these aggravating factors were present in this case. Respondents' counsel, after having created an all-black jury, then proceeded to inflame that jury with appeals based on allegations of racism. *See supra* at 5-6. And counsel even went so far (*see supra* n.5) as to use race to "cast doubt . . . upon the standing or due regard of an attorney who appear[ed] in the case." *Powers*, 499 U.S. at 412. The jury then responded to this strategy with a large punitive damages verdict that the Court of Appeals found was unsupported by the evidence.[11]

The record in this case thus shows that the right upheld in *Batson* is not an empty procedural formality, and that a violation of that right can infect the course of the entire proceedings. Particularly in a case such as this one, courts must carefully scrutinize counsel's disparate treatment of potential jurors to ensure that racial discrimination plays no role in the outcome of the case. However, in the absence of a definitive ruling from this Court resolving the longstanding conflict on the issue, courts will continue to rubber-stamp such facially discriminatory behavior.

---

[11] The importance of an all-black jury to counsel's strategy is amply demonstrated by the contrast between the proceedings below and an earlier trial of this case that ended in a mistrial due to the death of one of the defendants. In the first trial, where the jury was not all-black, counsel's opening statement did *not* charge the defendants with racism. *See* Apr. 4, 1988 (10:00 a.m.) Tr. at 115-16, 117, 139.

CONCLUSION

For the foregoing reasons, the petition should be granted and the judgment below reversed.

Respectfully submitted,

B. MICHAEL RAUH
MARTIN SHULMAN
MANATT, PHELPS & PHILLIPS L.L.P.
1501 M Street, N.W.
Suite 700
Washington, D.C. 20005
(202) 463-4300

Counsel for Petitioner the Estate of Jonathan Woodner

GREGORY K. WELLS
SMALLWOOD & WELLS, P.A.
1801 McCormick Drive
Suite 160
Landover, MD 20785
(301) 925-2000

Counsel for Petitioner Steven Z. Laufer

WALTER A. SMITH, JR.*
STEPHEN G. VASKOV
JONATHAN S. FRANKLIN
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5728

JOHN J. DILLON
MONTEDONICO, HAMILTON & ALTMAN, P.C.
5301 Wisconsin Avenue N.W.
Suite 400
Washington, D.C. 20015
(202) 364-1434

Counsel for Petitioner The Jonathan Woodner Co

* Counsel of Record

APPENDICES

APPENDIX A

District of Columbia Court of Appeals

Nos. 90-CV-362 & 90-CV-541

JONATHAN WOODNER CO., *et al.*,

APPELLANTS/CROSS-APPELLEES,

v.

FRANCISCA BREEDEN, *et al.*,

APPELLEES/CROSS-APPELLANTS.

Appeals from the Superior Court
of the District of Columbia

(Hon. Donald S. Smith, Motions Judge)
(Hon. Robert M. Scott, Motions Judge)
(Hon. Paul R. Webber III, Motions Judge)
(Hon. Peter H. Wolf, Motions Judge)
(Hon. Sylvia Bacon, Trial Judge)

(Argued March 9, 1995 Decided September 14, 1995)

Walter A. Smith, with whom *Stephen G. Vaskov*, *Robert B. Duncan*, *Anna E. Blackburne* and *John J. Dillon* were on brief, for appellant/cross-appellee Jonathan Woodner Co.

B. Michael Rauh, with whom *Martin Shulman* and *Carroll D. Hauptle, Jr.* were on brief, for appellant/cross-appellee Estate of Jonathan Woodner.

Gregory K. Wells for appellant/cross-appellee Laufer.

Roy L. Pearson, Jr. for appellees/cross-appellants.

Joseph B. Whitebread, Jr., filed a brief on behalf of Shipley Corporation and the Estate of Ian Woodner as *amici curiae* in No. 90-CV-541.

Before STEADMAN, FARRELL and KING, *Associate Judges*.

KING, *Associate Judge*:

This appeal arises out of an action seeking damages for nuisance and intentional infliction of emotional distress grounded in allegations of poor housing conditions and intimidation by the landlord in attempting to convert the premises from rental to condominium use at Park Tower, an apartment building in Washington, D.C., brought by former tenants ("tenants") against three defendants (all referred to collectively as "management" or "landlord"): the owner of Park Tower, the Jonathan Woodner Company ("Woodner Co."); the estate of the Vice-President of Woodner Co., Jonathan Woodner ("Estate");[1] and Steven Z. Laufer ("Laufer"), who was a partner with Jonathan Woodner in Newpark Towers Associates ("Newpark"), which was formed in July 1979 for the purpose of converting Park Tower into condominiums. The principal dispositive questions presented in this appeal are: (1) whether entitlement to an award of punitive damages requires proof by clear and convincing evidence; (2) whether a punitive damage award can be maintained against the estate of a deceased tortfeasor; and (3) whether, when presenting evidence of an ability to pay punitive damages, proof of current net worth is required to sustain an award.

For the reasons set forth below, we adopt the clear and convincing evidence standard of proof for punitive damages. We also hold that: (1) punitive damages do not survive the death of a tortfeasor; and (2) where a plaintiff seeks to recover punitive damages based on the wealth of the defendant, proof of the defendant's current net worth is required. Finally, we conclude that the evidence was sufficient to support the tenants' claim of

---

[1] Jonathan Woodner died in an airplane crash during the proceedings and the trial court accordingly substituted the Estate of Jonathan Woodner as a defendant.

intentional infliction of emotional distress, but that the claim of nuisance must be dismissed.[2]

I.

The present action arises out of a dispute between a number of tenants and the management of the former Park Tower. In 1978, the nearly fifty-year-old Park Tower, located at 2440 Sixteenth Street, N.W. in the District of Columbia, was deteriorating and in need of repair due to its advanced age. Because of the building's condition, Jonathan Woodner and Woodner Co. ceased renting apartments in August 1978 as they became vacant. They also wrote to the remaining tenants acknowledging the deteriorating conditions and informing them of their intent to determine the best way to

---

[2] In the cross-appeal, the tenants challenge five separate orders of the trial court, *viz*: (1) Judge Smith's denial of the tenant's motion to compel certain discovery; (2) an order by Judge Scott, reaffirmed by Judge Webber, continuing the trial court proceedings during the pendency of related matters before the Rental Housing Commission; (3) Judge Wolf's denial of the tenant's motion, made nearly six years after the action was commenced, to amend the complaint to include the Shipley Co. and Jonathan Woodner's father, Ian Woodner, as parties; and (4) & (5) two orders entered by Judge Wolf denying two separate subsequent motions to reconsider his order denying the motion to amend the complaint. Management contends, on various grounds, that none of the orders are properly before us. Those contentions present complicated questions which we need not decide because the cross-appeal can be resolved summarily. For example, the motion for continuance was not opposed by the tenants, and all of the challenged orders are reviewable for an abuse of discretion, which we do not find. *Rosenthal v. National Prods. Co.*, 573 A.2d 365, 374 (D.C. 1990) (trial court's resolution of discovery problems "will not be disturbed on appeal unless . . . discretion has been abused"); *Hairston v. Gennet*, 501 A.2d 1265, 1268 (D.C. 1985) (grant or denial of motion for continuance is within trial court's discretion); *Gordon v. Raven Sys. & Research, Inc.*, 462 A.2d 10, 13 (D.C. 1983) (the decision to grant or deny a motion for leave to amend the complaint is "entrusted to the sound discretion of the trial court"). Therefore, the cross-appeal must be affirmed.

repair the building and address its numerous problems. In May 1979, a group of tenants formed the Park Tower Tenants' Association ("Tenants' Association") whose goals included "[t]he assurance of perman[en]cy for tenants of Park Tower . . . the resumption of previously reduced and/or eliminated services . . . [and] the correction of all housing code violations." To achieve these goals, the Association organized a rent strike in which sixteen tenants paid rent into an escrow account rather than to the Woodner Co. On July 26, 1979, Jonathan Woodner and Laufer formed Newpark Towers Associates for the purpose of renovating, developing, managing and marketing Park Tower as a condominium or co-op.

Over the next fourteen months, the Woodner Co. made various relocation offers which were rejected by the striking tenants.[3] The evidence, viewed in the light most favorable to the tenants, showed that, despite Woodner Co.'s assertions that it had done all it could to keep the building in repair during the attempted condominium conversion, management continued to allow unsafe and unsanitary conditions to exist, such as: exposed electrical wiring, darkened stairwells, boarded emergency exits, sporadic fires, open vacant apartments, uncapped radiator pipes and gas lines, unsecured entrance and exit doors, missing fire extinguishers, an inoperative fire alarm system, and the presence of urine and feces throughout the building. Also during this period, a group of men, called "workmen" or a "demolition crew" by management, moved into some of the vacant apartments and thereafter engaged in acts which threatened, intimidated, and harassed a number of the tenants. The tenants contend that this harassment was either instigated by management, or done with management's blessing or acquiescence.

---

[3] Some of the members of the Tenant's Association accepted the management's relocation offers and moved to other apartment buildings.

On September 19, 1980, thirteen tenants[4] filed the instant action seeking emergency injunctive relief and compensatory and punitive damages for nuisance and intentional infliction of emotional distress. The complaint alleged that over a two-year period, the management interfered with the tenants' "use and enjoyment" of their homes by removing all services and security from the building, and permitting the "demolition crew" to intimidate the tenants. The tenants sought an immediate injunction to: halt the demolition work; repair unsecured open gas lines; bar the presence of non-tenant alcoholics and drug addicts living in the building; and to discontinue other "interference with the plaintiffs' property interests." The tenants claimed they suffered "actual physical damage to [themselves] and their property, a disturbance of [their] peace of mind and a serious threat of future injury, as well as humiliation, anxiety, and apprehension, all of which was foreseeable and intended by defendants."

Following various discovery delays, stays due to the pendency of related actions, and a mistrial following Jonathan Woodner's death, a four-week jury trial before Judge Sylvia Bacon began on February 22, 1989. The jury returned verdicts in favor of the nine remaining tenants for both nuisance and intentional infliction of emotional distress, awarding the tenants compensatory damages ranging from $30,000 to $50,000 for nuisance, and from $60,000 to $80,000 for intentional infliction of emotional distress, for a total compensatory award of $965,000. Following another week of trial on punitive damages, the jury awarded the tenants collectively a total of $15 million in punitive damages: $9 million against the Woodner Co.; $4.5 million against Laufer; and $1.5 million against the Estate of Jonathan Woodner. Approximately one year later, on March 23,

---

[4] Only nine of the original thirteen tenants remained in the case by time of trial. Two other tenants settled while this appeal was pending, leaving seven tenant-appellees in this appeal.

1990, the trial court denied all post-trial motions, and these appeals followed.

II.

Management seeks reversal of the jury's verdicts on three broad grounds. First, it contends that the "verdict is fatally tainted" by the tenants' use of race-based peremptory strikes during jury selection and "repeatedly and prejudicially appealing to racial bias before the resulting all-black jury."[5] Second, management maintains that the evidence is insufficient as a matter of law to support either the claim for nuisance or intentional infliction of emotional distress. Third, management challenges the punitive damage award on a number of grounds set forth below. The Estate also contends that the District of Columbia survival statute precludes a punitive damage award against the estate of a deceased defendant.

A. Nuisance

Management claims that the tenants' verdict on their nuisance claim must be reversed as a matter of law. We

---

[5] Judge Bacon rejected management's contentions, that the tenants used race-based peremptory strikes and impermissibly invoked racial bias before the jury, in her Order of March 23, 1990, denying management's motions for judgment notwithstanding the verdict, involuntary dismissal, mistrial or new trial. Because there is record support for the trial judge's findings that the tenants did not use peremptory challenges in a racially discriminatory manner, and that, while race was an issue, the case was presented to the jury in "a reasonable manner . . . and race was not exploited improperly," we will not disturb those findings on this appeal. *See Batson v. Kentucky*, 476 U.S. 79, 100 (1986) (trial court has discretion to decide if "facts establish, prima facie, purposeful discrimination" in use of peremptory strikes); *Purkett v. Elem*, ___ U.S. ___, 115 S.Ct. 1769, 1771 (1995) (trial court must "determine[ ] whether the opponent of the strike has carried burden of proving purposeful discrimination"); *Johnson v. Fairfax Village Condo*, 641 A.2d 495, 501 (D.C. 1994) (exercise of discretion will be reversed on appeal only upon clear showing of abuse).

agree, based on this court's decision in *Bernstein v. Fernandez*, 649 A.2d 1064 (D.C. 1991).[6]

In *Bernstein*, a tenant faced with leaking and falling ceilings, rodent and roach infestation, and numerous other necessary repairs which her landlord neglected to correct, sued her landlord for nuisance and intentional infliction of emotional distress. *Id.* at 1066-67. On appeal, this court held that the tenant's nuisance claim did not lie. *Id.* at 1072. First, we held that the condition of the premises (infestation, falling ceilings, etc.) might give rise to an action for breach of the settlement agreement or breach of the warranty of habitability, but "did not amount to nuisance . . . in the legal sense." *Id.* Rather, we said that nuisance, at least in this context, "is not a separate tort in itself but a type of damage . . . [and] the plaintiff must recover, if at all, on the theory of negligence [or some other tort]." *Id.* (citations omitted).

---

[6] *Bernstein* was decided by this court in March 1991, a year after the trial court ruled on the post-trial motions, and was thus not available for the trial court to consider in resolving those motions.

The tenants claim that *Bernstein* should not be retroactively applied to this case. In determining whether a new rule of law will be applied retroactively we examine the extent of the reliance by the parties on the old rule of law. *Mendes v. Johnson*, 389 A.2d 781 (D.C. 1978) (en banc). In this case, the tenants point to no clear past precedent on which they have relied, and we are not aware of any authority in this jurisdiction which has upheld a nuisance action against a landlord. In short, this court has never recognized nuisance as a cause of action under these circumstances, and we merely stated so in *Bernstein*. *See Reese v. Wells*, 73 A.2d 899, 902 (D.C. 1950) ("nuisance [is] a field of tort liability, and not a single type of tortious conduct") (internal quotation omitted); *see also District of Columbia v. Fowler*, 497 A.2d 456, 461-62 n. 8 (D.C. 1985) ("nuisance . . . is not a separate tort in itself"; moreover, "some 'tortious conduct' is a necessary component of virtually all nuisance claims"). Therefore, because there was no contrary rule of law on which the tenants could have relied, *Bernstein* merely recognizes the existing state of the law which regards nuisance in this context as a type of damage, not as a cause of action.

Therefore, because nuisance is a type of damage and not a theory of recovery in and of itself, any element of intent in management's actions in this case must be addressed under the intentional infliction of emotional distress claim.

Second, we held that, because "damages flowing from a nuisance are measured by the diminution of the property's value caused by the nuisance's interference with the enjoyment of the property," and because the tenant had already recovered her full rent as damages under a breach of warranty of habitability claim, her leasehold could not have been further devalued as a result of any "nuisance." *Bernstein*, 649 A.2d at 1073 (citation omitted). Consequently, *Bernstein* would govern the nuisance claim of the tenants in this case to the extent that they seek damages up to the property value. Because, however, the tenants sought and received rent recoupment in an earlier landlord-tenant action based on the same alleged defects underlying their nuisance claim, like the tenant in *Bernstein*, they have already been fully compensated for the diminished value of their leasehold, and "the so-called nuisance could not have further diminished [its] value." *Id.* at 1073. Accordingly, because nuisance here is not a separate tort and because the tenants have already recovered the full amount of such damages, the nuisance claim must be dismissed as a matter of law.

B. Intentional Infliction of Emotional Distress

Management also maintains that there was insufficient evidence to establish the claim for intentional infliction of emotional distress. In reviewing the trial court's decision to submit that claim to the jury, "we must view the evidence in the light most favorable to [the tenants], giving [them] the benefit of every rational inference therefrom." *See King v. Kidd*, 640 A.2d 656, 667 (D.C. 1993). To establish a claim for intentional infliction of emotional distress, a plaintiff must prove that the defendant engaged in: (1) extreme and outrageous con-

duct that (2) intentionally or recklessly caused (3) severe emotional distress to another. *Id.* at 668. In making this claim, management again relies on *Bernstein*, contending that "if the Bernstein landlord's conduct was not sufficiently 'extreme' or 'outrageous' to constitute intentional infliction of emotional distress, clearly the alleged conduct of these defendants cannot be either." Thus, management only challenges the sufficiency of the evidence of the first element of this tort ("extreme and outrageous conduct").[7]

In *Bernstein*, we affirmed the dismissal of the tenant's intentional infliction of emotional distress claim, largely because the landlord's "failure to make effective repairs" was not "so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency." *Bernstein*, *supra*, 649 A.2d at 1075. Management maintains that the evidence in the instant case is no different from the facts of *Bernstein*. As described above, in *Bernstein*, there were leaking ceilings, dead rats and mice, roaches, gas leaks and rotten bath tiles. In the instant case there were similar deficiencies (*see supra*, discussion at p. 4-5); in fact, the conditions on the premises in this case were arguably much worse than those present in *Bernstein*. Nonetheless, *Bernstein* holds that bad conditions alone are not sufficient to support a claim of intentional infliction of emotional distress. *Id.* at 1075.

However, what sets this case apart from *Bernstein* is the evidence, viewed in the light most favorable to appellees, which established that the tenants were subjected to far more than the deteriorating conditions at Park Tower in the form of management's employment of "workmen" to intimidate the tenants. For example, two

---

[7] "It is possible to infer the existence of the second element of the tort—intent or recklessness—from the very outrageousness of a defendant's conduct." *King*, *supra*, 640 A.2d at 668 n. 14 (citing *Sere v. Group Hospitalization, Inc.*, 443 A.2d 33, 38 (D.C.), *cert. denied*, 459 U.S. 912 (1982)).

witnesses testified that a "Floyd Davis, who was managed by Laufer," was sent by management to the tenants' apartments, with a gun that he repeatedly "accidentally" dropped, in an effort to persuade them to vacate. The evidence also showed that management hired a man named June Burton as the Park Tower "resident manager" to do the "heavy work," which management's agents acknowledged they "really had no choice but to do" to achieve their goals at Park Towers. As two tenants also testified to drug use and a pistol being brandished by this June Burton, the jury could readily infer that the "heavy work" included intimidation. Witnesses also testified to observing Woodner and Laufer personally handing out liquor to the "workmen" who had moved into Park Tower.

The foregoing conduct must be considered in "the specific context in which . . . [it] took place, for in determining whether conduct is extreme or outrageous, it should not be considered in a sterile setting." *King*, *supra*, 640 A.2d at 668 (citation omitted). As this court held in King, where a woman brought claims against her supervisor for sexual harassment, and intentional infliction of emotional distress from that conduct, the extreme and outrageous nature of conduct may arise from the position of authority the actor maintains over the other person. *Id.* at 659. Further, the court in *King* held that "a defendant's conduct [is] carefully scrutinized where the defendant is in a peculiar position to harass the plaintiff and cause emotional distress." *Id.*

Management maintained a position of authority over the tenants by virtue of their status as owner and manager, their access to resources, and their ultimate control over the building in which the tenants lived. Consequently, the appellants were in a "peculiar position to harass the plaintiff[s]." *King*, 640 A.2d at 668. Considering management's position, the evidence, viewed in the light most favorable to the tenants, shows that at the very least, the management knew, or should

have known, of Davis's and Burton's systematic efforts to harass and intimidate the tenants, and therefore the management could be held to have acquiesced in those activities. The evidence that: (1) Jonathan Woodner and Laufer personally gave liquor to the so-called "workmen"; (2) Jonathan Woodner and his father specifically sought out Laufer "because of his experience in dealing with this kind of problem"; and (3) that Laufer advised both Woodners that "one had really no choice but to do a certain amount of heavy work," and that June Burton was the man to do it, was sufficient to permit a jury to find that management actually condoned the harassment of the tenants.

Therefore, considering the context and nature of management's conduct and the prevailing norms of what is acceptable in society for property managers, by condoning or acquiescing in the activities of Burton and Davis, management engaged in what the jury could fairly determine to be "extreme and outrageous" behavior. *See King*, 640 A.2d at 668 (in determining whether conduct is outrageous, court should consider nature of activity, its context, and the prevailing norms of society); *Harris v. Jones*, 380 A.2d 611, 614-15 (D.C. 1977) (what is considered outrageous varies depending on the context; where "defendant is in a peculiar position to harass the plaintiff and cause emotional distress, his conduct will be carefully scrutinized by the courts"). Because the tenants presented prima facie evidence of management's extreme and outrageous conduct, and management does not challenge the sufficiency of the evidence of the remaining elements of the tort, we hold that the evidence was sufficient for the jury to find that management intentionally inflicted emotional distress upon the tenants. *Id.* at 615 (jury to determine whether "the conduct has been sufficiently extreme and outrageous to result in liability").

C. Punitive Damages

Management principally argues that the punitive damage awards must be reversed for the following reasons: (1) if either the nuisance or intentional infliction of emotional distress claim cannot be sustained, the entire punitive damage award must fail because the jury awarded a single punitive damage award based on both claims;[8] (2) the jury should have been instructed that clear and convincing evidence was the proper evidentiary standard for determining punitive damages; (3) there is insufficient evidence of appellants' malice;[9] (4) in the case of Jonathan Woodner, a punitive damage award does not survive his death and (5) in the case of Woodner Co. and Laufer, the punitive damage award is unsupported by the evidence.[10]

---

[8] *See, e.g., Nimetz v. Cappadona*, 596 A.2d 603, 608 (D.C. 1991) (party who opposed special verdict form, which would have clearly shown basis for jury's verdict, waives claim on appeal); *see also Franklin Inv. Co. v. Smith*, 383 A.2d 355, 358 (D.C. 1978) (punitive damages may not be awarded where there is no basis for compensatory damages). We do not need to reach this issue because we hold, *infra*, the punitive damage awards cannot stand for other reasons.

[9] Using the preponderance of evidence standard, this claim is resolved in the tenants' favor essentially for the reasons we relied upon in holding that the evidence was sufficient to sustain the claim of intentional infliction of emotional distress.

[10] Because we hold that the appellees' punitive damage award must be reversed for the reasons stated, we do not need to consider management's contention that the punitive damage awards were so excessive so as to violate due process. Management also attacks the punitive damage awards on the ground that the tenants improperly presented evidence and argument regarding its own costs of litigation and the duration of the litigation, and that the trial court employed inadequate procedural safeguards to ensure the fairness of the award. Because we reverse the punitive damage awards, we will not consider those issues. On remand, the trial court is free to address them anew.

1. Clear and Convincing Evidence

In its motions for directed verdict, each defendant urged the trial court to apply a clear and convincing evidence standard to the determination whether punitive damages should be awarded. The tenants objected and the court denied the request, and instead applied the preponderance of evidence standard. Later Laufer presented a proposed jury instruction that included the clear and convincing evidence[11] standard but, over the tenants' objection, the court rejected that proposal and instructed the jury that the preponderance of the evidence standard applied to the determination of both entitlement to and the amount of punitive damages. In this court, management renews the request it made to the trial court, asking that we adopt the clear and convincing evidence standard.

Earlier this year in *Dyer v. Bergman & Assoc.*, 657 A.2d 1132 (D.C. 1995), we observed:

> This court has never specifically determined whether the facts on which a plaintiff's claim for punitive damages is based must be proved by a preponderance of the evidence—the conventional civil standard—or by a more exacting measure of proof. . . . Because punitive damages are, at least from the defendant's perspective, generally in the nature of a fine, it may well be appropriate to require proof by clear and

---

[11] The proposed jury instructions included a "clear, convincing, and unequivocal" standard. The tenants argue that by including the term "unequivocal" management has not preserved the issue of its entitlement to a "clear and convincing" instruction in this court. We reject that argument because management unambiguously asserted the clear and convincing standard in its arguments for directed verdict and during the discussion of the jury instruction. It is clear that the trial court rejected any standard more exacting than preponderance of the evidence, and inclusion of "unequivocal" in the proposed jury instruction played no role in the trial court's reasoning.

> convincing evidence of the commission of the tort and of the outrageousness of the conduct.

Id. at 1139 (internal citations omitted).[12] We did not decide the issue in *Dyer* because it had not been preserved in the trial court. That is clearly not the case here. We are persuaded by the growing majority of jurisdictions deciding the issue that we should adopt the requirement that proof by clear and convincing evidence must be shown in order to receive an award of punitive damages.

We begin with the Supreme Court's recent observation that there is much to be said for requiring a clear and convincing, or even a reasonable doubt standard,[13] for the award of punitive damages. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 n. 11 (1991). One year after *Haslip*, the Maryland Court of Appeals held that the "[u]se of a clear and convincing standard of proof will help insure that the punitive damages are properly awarded." *Owens-Illinois v. Zenobia*, 601 A.2d 633, 657 (Md. 1992). The Maryland court reasoned that punitive damages are penal in nature and therefore a more exacting standard, such as one that Maryland imposes, as we do,[14] in fraud and attorney disciplinary

---

[12] In making this observation, the *Dyer* court cited two cases from this jurisdiction which generally discuss this issue, without firmly holding that a particular standard of care is required. *See Darrin v. Capital Transit Co.*, 90 A.2d 823, 825 (D.C. 1952) (for an award of punitive damages, "something more than ordinary negligence [must be shown]; it must be reckless and of a criminal nature and clearly established"); *De Foe v. Potomac Elec. Power Co.*, 123 A.2d 920, 922 (D.C. 1956) ("As a predicate for awarding exemplary damages against a corporation . . . it must be found that the acts . . . were unlawful, partaking somewhat of a criminal or wanton nature, and that they were characterized by willfulness, wantonness and malice and such conduct must be clearly established.")

[13] By statute Colorado requires proof beyond a reasonable doubt. COLO. REV. STAT. § 13-25-127(2) (1989).

[14] *See In re Lenoir*, 585 A.2d 771, 784 (D.C. 1991) (in attorney disciplinary cases, "Bar Counsel is obliged to prove, by clear and

cases, should be applied. *Id.* at 656. In reaching that conclusion, the Maryland court found particular support in the decisions of the courts of Hawaii, Arizona, and Maine. *See Masaki v. General Motors Corp.*, 780 P.2d 566 (Haw. 1989); *Tuttle v. Raymond*, 494 A.2d 1353 (Me. 1985); *Linthicum v. Nationwide Life Ins. Co.*, 723 P.2d 675 (Ariz. 1986).

For example, the Maryland court cited with approval the reasons given in *Masaki* for adopting the clear and convincing evidence standard. Specifically, the *Masaki* court observed:

> [P]unitive damages are a form of punishment and can stigmatize the defendant in much the same way as a criminal conviction. It is because of the penal character of punitive damages that a standard of proof more akin to that required in criminal trials is appropriate. . . . A more stringent standard of proof will assure that punitive damages are properly awarded.

Masaki, supra, 780 P.2d at 575.

Similarly, the Supreme Judicial Court of Maine, observing that "although punitive damages serve an important function in our legal system, they can be onerous when loosely assessed," concluded:

> The potential consequences of a punitive damages claim warrant a requirement that the plaintiff present proof greater than a mere preponderance of the evidence. Therefore, we hold that a plaintiff may recover exemplary damages based on tortious conduct only if he can prove by clear and convincing evidence that the defendant acted with malice.

---

convincing evidence, that a violation of a disciplinary rule has occurred"); *Park v. Sandwich Chef, Inc.*, 651 A.2d 798, 802 n. 3 (D.C. 1994) (fraud must be proven by clear and convincing evidence).

Tuttle, 494 A.2d at 1363. Finally, the Arizona court concluded:

> As this remedy is only to be awarded in the most egregious of cases, where there is reprehensible conduct combined with an evil motive over and above that required for the commission of a tort, we believe it appropriate to impose a more stringent standard of proof.

Linthicum, *supra*, 723 P.2d at 681. Other jurisdictions considering the issue have also required the clear and convincing standard for an award of punitive damages. *See, e.g., Chizmar v. Mackie*, 896 P.2d 196, 210 (Alaska 1995); *Boling v. Tennessee State Bank*, 890 S.W.2d 32, 33 (Tenn. 1994); *Travelers Indem. Co. v. Armstrong*, 442 N.E.2d 349, 362-63 (Ind. 1982); *Wangen v. Ford Motor Co.*, 294 N.W.2d 437, 458 (Wisc. 1980).

We have always recognized that punitive damages are a form of punishment, *Arthur Young & Co. v. Sutherland*, 631 A.2d 354, 372 (D.C. 1993). We have also observed that "[p]unitive damages are warranted only when the defendant commits a tortious act accompanied with fraud, ill will, recklessness, wantonness, oppressiveness, wilful disregard of the plaintiff's right, or other circumstances tending to aggravate the injury." *Washington Medical Ctr. v. Holle*, 573 A.2d 1269, 1284 (D.C. 1990) (citations and internal quotation omitted). Therefore, for these reasons and for the reasons expressed by the authorities cited above, we hold that in order to sustain an award of punitive damages, the plaintiff must prove, by a preponderance of the evidence, that the defendant committed a tortious act, and by clear and convincing evidence that the act was accompanied by conduct and a state of mind evincing malice or its equivalent. *Masaki*, *supra*, 780 P.2d at 575 ("plaintiff must prove by clear and convincing evidence that defendant has acted wantonly or oppressively or with . . . malice . . . ."); *Tuttle*, *supra*, 494 A.2d at 1363 ("plaintiff may recover exemplary damages based upon

tortious conduct only if he has proven by clear and convincing evidence that the defendant acted with malice"); *Linthicum*, *supra*, 723 P.2d at 681 (same; following *Tuttle*). In short, the jury must be instructed that punitive damages may be awarded only if it is shown by clear and convincing evidence that the tort committed by the defendant was aggravated by egregious conduct and a state of mind that justifies punitive damages.

2. Estate of Woodner

The Estate maintains that the trial court erred in permitting punitive damages to be awarded against the estate of Jonathan Woodner. While this is an issue of first impression for this court, the issue need not detain us long because we are persuaded by the overwhelming weight of authority, that punitive damages may not be awarded against the estate of a deceased defendant.

We first look to the survival statute for guidance. At common law, all personal causes of action against a deceased person died with that person. *Greater Southeast Community Hosp. v. Williams*, 482 A.2d 394, 396-97 (D.C. 1984). The District of Columbia modified this common law rule by enacting the "Survival Statute" codified as D.C. Code § 12-101 which provides:

> On the death of a person in whose favor or against whom a right of action has accrued for any cause prior to his death, the right of action, for all such cases, survives in favor of or against the legal representative of the deceased.

Although preserving certain causes of action after death, the statute says nothing about whether an award of punitive damages against the estate survives. We therefore must look for other evidence of legislative intent. An examination of the history of the survival statute and the amendments to it reveals that the imposition of punitive damages against the estate of a deceased defendant was never authorized or

envisioned.[15] Rather, until the 1978 amendment, the survival statute only preserved various *causes of action* following one's death; damages, of course, are not a cause of action, but a form of relief and punishment. *See, e.g., Bernstein, supra*, 649 A.2d at 1072-73; *see also Gibbs v. Investigators of D.C. Inc.*, 105 Daily Wash. L. Rptr. 1, 3, (D.C. Super. Ct. January 3, 1977); *Goodacre v. Shulmier*, 64 App. D.C. 10, 73 F.2d 519 (1934). Finally, as a statute in derogation of the common law, the survival statute must be narrowly construed. *Saunders v. First Nat'l Realty Corp.*, 245 A.2d 836, 838 (D.C. 1968).

In the District of Columbia, the "basic purposes" of punitive damages are punishment and deterrence. *Robinson v. Sarisky*, 535 A.2d 901, 907 (D.C. 1988). In permitting the punitive damage award to stand against the estate, the trial court reasoned that the purpose of

---

[15] *See, e.g.*, REPORT OF THE COUNCIL OF THE DISTRICT OF COLUMBIA'S COMMITTEE ON THE JUDICIARY, "BILL 2-52, THE DISTRICT OF COLUMBIA GENERAL SURVIVAL OF TORT ACTIONS ACT" (March 8, 1978) (summarizing history of legislative changes in our survival statute):

> The District of Columbia survival statute is the result of three successive Congressional enactments. The first District survival statute, section 235 of chapter 854 of the Act of March 3, 1901 (An Act to Establish a Code of Law for the District of Columbia, 31 Stat. 1227), removed the common law barrier to the survival of personal actions. The second, section 1 of chapter 508 of the Act of June 19th, 1948 (Public law 80-677, 62 Stat. 487) broadened the language of the survival statute to apply to "any cause of action" and excluded damages for pain and suffering from recovery in tort actions. The third statutory change, the Act of December 12, 1963 (Public Law 88-241, 77 Stat. 509), which recodified all of Title 12 of the District of Columbia Code, was aimed simply at clarifying the statutory language.

The 1978 amendment, which was accompanied by the above-cited report, reflected a legislative intent to permit recovery for pain and suffering in survival actions. *See Graves v. United States*, 517 F. Supp. 95 (D.D.C. 1981).

punitive damage awards in the District of Columbia is "punish the tortfeasor and to deter [the tortfeasor and] others from engaging in similar conduct" (emphasis in original). The Estate convincingly argues, however, that the primary purpose of punitive damages is to punish and deter the tortfeasor, and that deterrence of others is secondary. *See, e.g., id.* (identifying deterrence and punishment as purposes of punitive damages without mentioning deterrence of others as additional goal).

The theory of justice which punishes a wrongdoer for his or her acts while avoiding punishment of innocent parties has persuaded courts and legislatures in nearly every jurisdiction deciding the issue to disallow punitive damages against estates.[16] For example, in *Lohr v. Byrd*, 522 So.2d 845 (Fla. 1988), the Supreme Court of Florida held that punitive damages may not be imposed upon the "innocent heirs or creditors of a decedent's estate" because to do so would unduly punish the decedent's widow and children and creditors. The court reasoned:

> If deterrence is justified in this instance, it would also be justified to require a decedent's family to pay a fine or be imprisoned for the decedent's criminal conduct. With the wrongdoer dead, there is no one to punish, and to punish the innocent ignores our basic philosophy of justice.

---

[16] Of the states that have ruled on the issue, twenty-eight follow the rule that punitive damages do not survive the death of the tortfeasor. Only four states have taken the contrary position and do so on grounds not applicable in the District of Columbia. *See Hofer v. Lavender*, 679 S.W.2d 470 (Tex. 1984) (punitive damages also serve as reimbursement "for losses too remote to be considered as elements of strict compensation"); *Perry v. Melton*, 299 S.E.2d 8, 13 (W. Va. 1982) (punitive damages serve added function of "providing additional compensation"); *Munson v. Raudonis*, 387 A.2d 1174, 1177 (N. H. 1978) (same); *Ellis v. Zuck*, 546 F.2d 643 (5th Cir. 1977) (in applying Alabama law, Court held because punitive damages are recoverable under Alabama Wrongful Death Act, such damages are also recoverable under the Survival Statute).

Id. at 847. In *Crooker v. United States* 325 F.2d 318, 321 (8th Cir. 1963) the Eighth Circuit echoed similar public policy concerns when it noted that the purpose of criminal fines is to punish the defendant for his offense, but that "there is no justice in punishing his family for his offense." *Id.* Finally, the Supreme Court of Alaska elected to adhere to the judicial philosophy which seeks to punish the wrongdoer and not the innocent in determining to:

> follow the better reasoned decision and hold that an injured party may not recover punitive damages from the estate of a deceased tortfeasor . . . [because t]he central purpose of punitive damages is to punish the wrongdoer and deter him from future misconduct. . . . Since the deceased tortfeasor cannot be punished, the general deterrent effect becomes speculative at best, and this, in our view, falls short of furnishing a justifiable ground for an award of punitive damages against the tortfeasor's estate.

Id. at 146.[17]

For all the foregoing reasons, we hold that our system of liability for wrongful acts is best served by not allowing awards of punitive damages against a tortfeasor's estate.

3. Sufficiency of Evidence for Punitive Damages Against Woodner Co. & Laufer

Woodner Co. and Laufer maintain that the punitive damage award is unsupported by the evidence because the tenants failed to prove Woodner Co.'s and Laufer's net worth, and therefore the punitive damage award must be set aside. We agree and therefore hold that a plaintiff seeking to recover punitive damages based upon the

---

[17] The restatement second of torts also takes the same position, stating that "the death of the tortfeasor terminates liability for punitive damages." RESTATEMENT (SECOND), TORTS § 926(b) (1979).

wealth of the defendant, as the tenants did here, must establish the defendant's net worth at the time of trial. We also hold that, while the tenants presented barely sufficient evidence to permit the jury to award some punitive damages based upon the defendants' ability to pay, that evidence fell gravely short of supporting the very sizeable punitive damage awards in this case. For these reasons, the issue of punitive damages must be retried. *Cf. Finkelstein v. District of Columbia*, 593 A.2d 591 (D.C. 1991) (en banc). We will consider each holding in turn.

First, management contends that punitive damages based on the wealth of the defendants requires proof of a defendant's current net worth (*i.e.*, at the time of trial). The standard jury instructions in this jurisdiction, and the jury instructions given in this case, support that contention.[18] The trial court instructed the jury:

> [N]et worth . . . is an indicia of the appropriate amount of punitive damages because it is a measure of the current wealth or the current financial situation of a defendant. . . . [N]et worth [is used] to measure current wealth because it gives an accurate measure of ability to pay. Earnings and/or assets alone as distinguished from net worth do not necessarily show ability to pay. You are also cautioned that earnings or assets in past years do not necessarily show ability to pay. . . . You consider all of the circumstances, consider net worth, assets, minus liability unless you find a concealment or a diversion which justifies consideration of the assets in determining what amount will punish, but not financially ruin the defendant. . . .
>
> However, in order to award punitive damages against any defendant, you must find that the defendant has a

---

[18] The tenants did not object to these instructions in the trial court, on any grounds applicable here, and do not challenge them in this appeal.

> financial ability to pay an award of punitive damages. Evidence of this is in the form of net worth. That is assets which exceed liability. If you are unable to determine a defendant's net worth because of a lack of evidence presented by plaintiffs or if you are not able to otherwise determine financial ability to pay punitive damages without speculating or if you find that a defendant is unable to pay punitive damages because that defendant has a negative or a zero net worth, then the amount of punitive damages would be [zero].

The trial judge also expressly instructed the jury that the burden of proving net worth was on the plaintiff. Consequently, in making its punitive damage award, the jury was clearly instructed to focus upon the net worth of the defendants.

Because the purpose of punitive damages is to punish a tortfeasor and deter future conduct, the amount of such damages should be enough to inflict punishment, while not so great as to exceed the boundaries of punishment and lead to bankruptcy. *See Arthur Young & Co., supra*, 631 A.2d at 372 ("purpose of punitive damages is to punish a person for outrageous conduct") (internal citation omitted); *Robinson v. Sarisky*, 535 A.2d 901, 906 (D.C. 1988) (same); *see also Wynn Oil Co. v. Purolator Chem. Corp.*, 403 F. Supp. 226, 232 (M.D. Fla. 1974) ("purpose of punitive damages is to punish defendants and serve as a deterrent . . . the award of punitive damages should only hurt but not bankrupt a defendant"). Therefore, since current net worth fairly depicts a tortfeasor's ability to pay punitive damages, the plaintiffs here were required to present sufficient proof of current net worth to support the punitive damages awarded by the jury.[19] *See, e.g., Snow v. Capitol*

---

[19] Neither party objected to the inclusion in the instructions of net worth as a relevant consideration in the circumstances here. Although, as we here hold, proof of net worth is required where a plaintiff invokes the defendant's wealth, net worth is only one of

Terrace, Inc., 602 A.2d 121, 127 n. 8 (D.C. 1992) (question of punitive damages was not permitted to go to jury because, in addition to other reasons, "the [trial] judge found insufficient evidence of [defendant's] net worth"). *See also Dumas v. Stocker*, 262 Cal. Rptr. 311, 315 (Cal. App. 4th Dist. 1989) ("We conclude that the absence of any evidence of [defendant's] net worth renders the amount of the award unsupported by the evidence"); *Welty v. Heggy*, 429 N.W.2d 546, 549 (Wisc. Ct. App. 1988) (any measure of net worth other than the difference between the value of the assets and liabilities of the defendants at a time reasonably close to the date of trial is "illusory").

---

several considerations relevant to a punitive damages determination. *See Bankers Multiple Ins. v. Farish*, 464 So.2d 530, 533 (Fla. 1985) ("We did not intend to abandon the required relationship between the amount of punishment and the nature, extent, and enormity of the wrong and all of the circumstances in relation to the tort. The net worth of a defendant is one factor to be considered, but so are the circumstances and the degree of wantonness or culpability."); 87 A.L.R. 4th 141 § 2(a) "Punitive Damages: Relationship to Defendant's Wealth as Factor in Determining Propriety of Award" ("[W]ealth is certainly not the only factor or even the determinative factor in arriving at the correct amount. Awards which might otherwise be appropriate in relation to the defendant's wealth have been held inappropriately excessive in light of other circumstances. . . ").

The instruction here given without objection read in part:

> In the District of Columbia, there are four factors that we often discuss in determining the amount of punitive damages. These are described as the net worth of a defendant, the nature of the wrong committed, the state of mind of the defendant and attorneys fees that a plaintiff has incurred in the instant case. A jury may also consider the duration of the litigation and the profitability of a defendant's misconduct.

See also STANDARDIZED CIVIL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA, No. 16-3 (1981).

Nor have appellants challenged on appeal the trial judge's decision to simply bifurcate the compensatory and punitive damages portions of the trial.

Second, the Woodner Co. and Laufer both contend[20] that the tenants failed to meet their burden of establishing their net worth, or at least sufficient net worth to support the verdicts reached by the jury. In the opening statement on punitive damages, tenants' counsel stated that the Woodner Co. was worth "in excess of a hundred million dollars" and that "the primary factor" for the jury to consider was evidence of "the assets of" the Company. Over objection, the tenants presented five exhibits: a draft of a loan application prepared by Woodner Co. three years prior to the trial; a real estate development proposal developed eight years prior to the trial; a 1979 projection of the potential value of Park Tower if the Company incurred the expense of successfully developing the building into condominiums; and two excerpts from the testimony of Jonathan Woodner in other proceedings two years earlier in which he identified the limited properties owned by the Company as of 1980. The Woodner Co. presented testimony that it owned only two properties at the time of trial, and that it managed but did not own most of the rental properties it had developed and maintained in the District.

The only evidence presented by the tenants to establish Laufer's net worth, which was admitted over Laufer's objection, were two of Laufer's financial statements, which were five and seven years old, to "prove his ability to generate income."[21] Laufer testified that, although the two financial statements accurately reflected his financial circumstances in the two years reported, he had recently suffered substantial financial

---

[20] The Estate of Jonathan Woodner also makes this argument; however, because we hold that the punitive damage award cannot be maintained against the Estate, we do not need to address the question of whether the tenants established the net worth of Jonathan Woodner's estate.

[21] Laufer's 1982 and 1985 financial statements showed a net worth of $11.2 million and $19.8 million, respectively.

reverses such that his net worth at the time of trial was in the negative.

We agree with management's contention that none of the exhibits presented by the tenants established the net worth of the Woodner Co. at all, much less at the time of trial. Similarly, although the exhibits presented against Laufer showed net worth, the information was not current. *See, e.g., Welty, supra*, 429 N.W.2d at 549 (measure of net worth is difference between value of assets and liabilities at time close to trial); *Fopay v. Noveroske*, 334 N.E.2d 79, 94 (Ill. App. 1975) (desired financial evidence to show tortfeasor's ability to pay is current net worth); *Dumas, supra*, 262 Cal. Rptr. at 316 (rejected requiring the defendant to "affirmatively . . . prove its penurious financial condition as a precondition to any appellate challenge to the excessiveness of the award"). The most that can be said of the evidence presented was that it was not unreasonable for the jury to infer that at the time of trial, both Woodner Co. and Laufer had some resources available to them to support a nominal punitive damage award, but there was no factual basis for the sizable awards actually made.

As in *Dumas*, this record includes various kinds of financial information, none of which firmly established the Woodner Co.'s or Laufer's net worth at the time of trial. For example, in *Dumas*, the plaintiff introduced evidence of a net gain on the sale of the subject property; the fact that the defendant owned, in prior years, between two and fifteen apartment buildings, without any evidence of any equity interest; and evidence that defendant filed "fictitious" business name statements, without any evidence of his income or equity interest in these businesses. *Dumas*, 262 Cal. Rptr. at 315. Despite that evidence, the Dumas court held "there was no evidence of [the plaintiff's] net worth at the time of trial," which is the proper measure of net worth, and that "the absence of any evidence of net worth renders the amount of the [punitive damage] award unsupported by

the evidence." *Id.* The case was remanded to the trial court for a "redetermination based on evidence of defendant's net worth . . . ." *Id.* at 317. The evidence presented here is similar to that presented in *Dumas*; however, we conclude that the tenants' evidence was sufficient to show some current ability of Woodner Co. and Laufer to pay, but that the damages awarded were far in excess of any proof of current net worth.[22]

Finally, we think that a ruling by the trial judge, shortly after the trial, convincingly shows that the punitive damage verdicts reached did not properly take into account the net worth of either the Woodner Co. or Laufer. After the punitive damage verdicts were entered the defendants promptly moved to stay the judgments pending the filing of post-trial motions. On May 15, 1989, in a written order, the trial judge granted the motions to stay, finding that if the Woodner Co. were required to pay the punitive damage award of $9 million and the $950,000 in compensatory damages for which it was jointly and severally liable, then the Company's "liability will far exceed its assets and it appears that the Company would proceed to bankruptcy." With respect to Laufer, the trial judge observed that satisfying the judgment "would require all of [Laufer's] assets and more. Attachment of his assets would deprive him of all his working capital." In short, the trial judge ruled, less than a month after the trial, that payment of the judgments[23]

---

[22] The only evidence in this record relating to Woodner Co.'s net worth shows that the punitive damage award was six times Woodner Co.'s net worth. Specifically, we note that after filing its notice of appeal, Woodner Co. requested a stay of the enforcement of the judgment pending appeal. The trial court appointed a Special Master to ascertain the net worth of the Woodner Co. to guide it in setting an appropriate bond. The finding of the Special Master, which was adopted by the trial court, was that the net worth of Woodner Co. as of May, 1990, one year after trial, was $1,500,000. In contrast, the punitive damage award against Woodner Co. was $9,000,000.

[23] Over 90% of the total judgment against Woodner Co. was for punitive damages ($9 million in punitive damages and $965,000

by Woodner Co. and Laufer would essentially bankrupt them. As the Maryland Court of Special Appeals recently observed: "when a punitive damage award consumes a defendant's total [net worth], it ceases to serve the societal goal of punishment" and cannot stand. *Fraidin v. Weitzman*, 611 A.2d 1046, 1068 (Md. App. 1992). The same can be said with respect to the punitive damage awards made by the jury here.

III.

We therefore reverse the judgment entered on the nuisance claim, reverse all awards of punitive damages, and affirm the cross-appeal. The judgment for compensatory damages for intentional infliction of emotional distress is affirmed. We remand to the trial court for further proceedings consistent with this opinion.

Affirmed in part.

Reversed in part.

---

for compensatory damages), and over 80% of the total judgment against Laufer was for punitive damages ($4.5 million in punitive damages and $965,000 in compensatory damages).

APPENDIX B

SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA

CIVIL DIVISION

ELISE JOYNER, et al.,	:	
Plaintiffs	:	
v.	:	Civil Action No. 12817-80
	:	Civil I - Judge Bacon
JONATHAN WOODNER COMPANY, et al.,	:	
Defendants	:	

MEMORANDUM OF DECISION AND ORDER

This matter comes before the Court on defendants' motion for judgment notwithstanding the verdict, involuntary dismissal, mistrial or new trial.

After considering the pleadings and the record, the trial court concludes that the verdicts should not be set aside or remitted for the following reasons:

-- The evidence of defendants' conduct at Park Towers and its injurious impact on plaintiffs justifies the substantial compensatory and punitive verdicts.

-- The jury did not misinterpret the evidence or succumb to improper motives in awarding compensatory and punitive damages.

-- The conduct of plaintiffs and their counsel does not require dismissal or mistrial.

-- The jury verdicts are not "beyond all reason."

Viewing the case as a whole, there was no miscarriage of justice. Defendants' contentions must be rejected and the findings of the jury must be sustained.

Factual Context

In the Spring of 1989, a Superior Court jury returned verdicts of almost $16 million in compensatory and punitive damages against the Jonathan Woodner company, the Estate of Jonathan Woodner,[1] and Steven Z. Laufer. The jury found these defendants liable to nine plaintiffs on claims of nuisance and intentional infliction of emotional distress arising out of events occurring when the Park Towers apartments were converted from rental units to condominiums.

The evidence showed that, in August of 1978, the nine plaintiffs were tenants at Park Towers located at 2440 Sixteenth Street, Northwest, in the District of Columbia. During that month, the landlord, Jonathan Woodner Company, ceased offering Park Towers units for rent. The Company noted many structural deficiencies in the 50-year-old building, including roof, plumbing and boiler problems.

Throughout 1978, 1979 and 1980, the tenants and the Company, through its officers or agents, discussed the defective conditions in the building and the owners' future plans. As conditions in the building deteriorated, a tenants association was formed and a rent strike was organized. By November 1979, over half of the tenants in Park Towers had left the building.

On November 30, 1979, the Jonathan Woodner Company gave notice of its intent to convert Park Towers into condominium units. Relocation assistance was offered. Most of the remaining tenants left Park Towers. The nine plaintiffs in this case, however, rejected relocation and remained in the building for various periods of time until March 1981.

On September 19, 1980, plaintiffs filed this suit against the Jonathan Woodner Company, Jonathan Woodner and Steven Z. Laufer. The Company was sued as the owner

---

[1] On May 17, 1988, the personal representative of the Estate of Jonathan Woodner was substituted as a party defendant.

of Park Towers. Jonathan Woodner was sued as an individual, as an officer of the company and as a partner in the renovation project. Steven Z. Laufer, who became partner of Jonathan Woodner in July 1979, was sued as a general partner and as the developer of "New Park Towers."

At trial, plaintiffs showed evidence of an appalling decline in living conditions at Park Towers between August 1978 and March 1981. Building service and security decreased to nearly zero. Vacant units were boarded up or used as housing for the demolition crew. The public areas of the building were destroyed. Elevators were taken out of service. Access to individual apartments was limited. Heat and water were not available for significant periods of time. The apartments occupied by plaintiffs were damaged and became roach and rodent infested. There was a criminal prosecution involving some 45 Housing Code violations as well as evidence of 39 other Housing Code violations. There were fires of unknown origin. The Fire Department sent 30 warnings or other communications to defendants. Criminal incidents in the building increased as security decreased. Eight complaints to police in 1978 escalated to 49 police complaints in 1980. The evidence included pictures and videotape displaying the living conditions.

Defendants, in presenting their case, showed that Park Towers needed major renovation in 1978. It was a 50-year-old building. The roof leaked. The boilers were unreliable. Pipes burst. Elevators broke faster than they could be fixed. Defendants also offered evidence of their efforts to maintain the building, to relocate tenants and to assure future housing for the tenants by offering special purchase prices when the condominium conversion was complete. They took the witness stand to deny any harassment, intimidation or malicious conduct and to explain the reasonableness of their conduct in trying to renovate and remodel the building. Evidence was given in support of their counterclaims against plaintiffs

for denying access for repairs, causing Housing Code violations, wasting the premises, interfering with the contractors who were working on the premises and libeling defendants by displaying derogatory signs from the windows of Park Towers.

The jury award of compensatory damages was divided as follows:

	Nuisance	Intentional Infliction of Emotional Distress
For Elise Joyner	$50,000	$80,000
For Francisca Breeden	$50,000	$80,000
For Archie McCallum	$15,000	$75,000
For Muriel Cardenas	$25,000	$80,000
For Margaret Adams	$25,000	$75,000
For Stanley Poindexter	$15,000	$75,000
For Winslow Spady	$15,000	$75,000
For Lydia Headecker	$25,000	$75,000
For Clarece Walker	$50,000	$80,000

Defendants did not recover on any of their counter-claims.

Following a bifurcated trial on the issue of punitive damages, the jury awarded punitive damages in favor of the nine plaintiffs as follows:

Against Jonathan Woodner Company	$9,000,000
Against Estate of Jonathan Woodner	$1,500,000
Against Steven Z. Laufer	$4,500,000

Racial Issues

The trial of this case included racial tension and racial issues. Some racial tension was inherent in the complaints of nine black tenants against a white-owned corporate landlord and two white individuals. Other matters with racial impact, however, surfaced during jury selection, opening statements and presentation of evidence.

The question to be resolved is whether plaintiffs appealed to racial bias in a manner which deprived defendants of a fair trial and infected the verdicts with bias and prejudice. For the reasons discussed in the following paragraphs, the trial court concludes that, in the context of this case, the racial matters did not produce verdicts which reflect racial bias.

Jury Selection: During jury selection, plaintiffs' counsel struck the only two eligible white persons and created a jury composed of six black persons.[2] Inquiry was made to determine whether there had been a purposeful exercise of preemptory challenges in a manner which removed all members of defendants' race from the jury and deprived them of equal protection of the law. Batson v. Kentucky, 476 U.S. 79 (1986).

Plaintiffs' counsel denied discriminatory motive. He explained that he did not "track" the race of persons being struck by either side and that the two persons in question were struck because of their requests to be excused based on employment problems. He also noted other "benign considerations" and objective data such as home ownership. Tremel Transcript of Proceedings (TR), February 23, 1989, Vol. II at 9-10 and 16. Defendants contend that this explanation for the exercise of plaintiffs' challenges is not a "neutral explanation."

The mere denial of a discriminatory motive or an affirmation of good faith in exercising preemptory challenges does not suffice as a neutral explanation. However, the explanation need not "rise to the level justifying exercise of a challenge for cause." It need only be a "'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges." Batson at 97; Fludd v. Dykes, 863 F.2d 822, 829 (11th Cir. 1989).

---

[2] There was one white person among the six alternates. However, no alternates were required during the trial of this case.

After reviewing the transcript of the jury selection, the trial court adheres to its finding that although there was prima facie showing of an exercise of preemptory challenges based on race, a "neutral explanation" was presented for the exercise of plaintiffs' challenges. Counsel had a legitimate basis for seeking jurors who did not have serious job conflicts or concerns. Trial time was estimated at four to six weeks and the bifurcation necessitated two separate periods of jury service. Persons who had serious job concerns, like the prospective juror who was worried about the national defense impact of his absence from work, could reasonably be excluded. As jurors, such persons might be distracted and not give full attention or, in light of their own serious concerns, might not be favorably disposed to a case which sometimes involved rather petty human behavior involving landlords and tenants.

Implicit in these findings is the trial court's conclusion that Batson applies to civil cases, that corporate defendants can be part of a "cognizable racial group" and that Batson protections extend to white racial groups as well as to blacks and other minority groups.

Opening Statements: Defendants also point to emphasis on racial issues in plaintiffs' opening statement. Indeed, the presence of racial issues became clear to the jury in plaintiffs' opening statement. Plaintiffs asserted that greed and race motivated defendants. Racial matters were mentioned at three different places in the 24-page opening statement.

> But two things had changed by August of 1978. They are not easy to talk about. Two motivations that were to motivate the three landlords in this case for 32 months. First was greed, second was racism.
>
> ****
>
> [I]t may be difficult to believe what a human being will do to other human beings when it's motivated by money and racism.

****

> As they sat there discussing what the motivations of the landlord could be, one thing was clear to them was the consequences of the landlord's conduct, consequences that they were receiving the 21st Century equivalent of a lynching, reminded them of treatment of blacks in the south when they attempted to stand up for their rights, the cattle prods, the dogs, the bestiality in which they were treated.
>
> . . . .
>
> They tried to come up with an understanding of what had happened, why they were being treated, lynched in effect. They came up with two causes. One obviously was greed. Condominium conversion and the quick millions that could be made from condo conversion was quickly reached. There was a second reason: Racism. The racial insensitivity of some kind because landlords, particularly the Woodner Company, had never treated tenants like that at Park Towers when the building was caucasian.

Tremel TR, February 23, 1989, Vol. I at 6, 16 and 22-23.

The Jonathan Woodner Company responded to the racial allegations in its opening. It advised the jury that:

- -- The evidence would "completely contradict" racial motivations and greed.
- -- Plaintiffs were motivated by greed in attempting to extract unreasonable amounts of money from the landlord.
- -- Plaintiffs were casting their case in a racial mode "in hopes to inflame the community, inflame you as jurors."

Tremel TR, supra at 26, 34 and 37.

After opening statements, defendants sought dismissal relying in part on plaintiffs' emphasis on the "racial aspects" of the case in opening statement. The motion

was held under advisement. Goad TR, February 24, 1989 at 20-24 and 31.

Evidence: Plaintiffs' evidence of racial motivation was often indirect. For example, the black plaintiffs described personal encounters with Jonathan Woodner, Steven Laufer and their agents which were discourteous and disrespectful. They laid ample, albeit subtle, foundation for an inference of racist behavior designed to intimidate them as black people. Some of the evidence was more direct including evidence that the conversion of Park Towers was driving the black plaintiffs out of affordable housing.

Defendants countered with evidence of the Jonathan Woodner Company's good reputation as a landlord and Jonathan Woodner's personal lack of bias. Black persons were called to testify on behalf of defendants.

The only other racial matters related to three-to-four lines of testimony and a "flyer" which did not come into evidence. The brief testimony noted that a black attorney began representing a defendant "just around the time of this trial." The statement was factually accurate. Further, the flyer merely invites the public to attend a trial which is identified as an "affirmative action law suit" with issues involving "discrimination against the poor and minorities."

Closing Arguments: In closing arguments, plaintiffs did not call on the jury to redress racial grievances. No mention was made of racial motivation or racism in any of plaintiffs' closing statements. Miller TR, March 20, 1989 at 22-42 and Tanner TR, April 24, 1989 at 40-62.

Conclusion: This is a case in which passions could run high. The trial court, however, is persuaded that (1) the case was presented to the jury in a reasonable manner and (2) the jury applied principles of law to the facts. Although racial issues were part of the case, race was not exploited improperly. None of the conduct in

opening statements, in presentation of evidence or in closing arguments caused the verdicts to be infected with racial bias.

Sufficiency of Evidence
of Nuisance and Intentional
Infliction of Emotional Distress

In this case, a jury of reasonable persons could properly have reached substantial verdicts in favor of the plaintiffs. Faniel v. Chesapeake & Potomac Telephone Co., 404 A.2d 147, 150 (D.C. 1979), quoting Baker v. D.C. Transit System, Inc., 248 A.2d 829, 831 (D.C. 1969). There was ample evidence of nuisance, intentional infliction of emotional distress and causally-related injuries.

Nuisance: A claim for private nuisance in the District of Columbia requires proof that:

-- Plaintiffs had a protected interest in and rightfully possessed the property in issue.

-- Defendants interfered with that interest in a substantial and unreasonable manner.

-- The interference inflicted damages on plaintiffs which were special to them as distinguished from damage which they might have in common with the general public.

B&W Management, Inc. v. Tasia Inv. Co., 451 A.2d 879, 882 (D.C. 1982); District of Columbia v. Fowler, 497 A.2d 456, 461 (D.C. 1979).

The uncontroverted evidence showed leasehold interests in each plaintiff. It also showed an accumulation of unsafe and unsanitary conditions in the public areas of Park Towers and in the individual apartments of plaintiffs. the videotape, the photographs and the testimony of the plaintiffs established a life-threatening environment at Park Towers. It was a dangerous and unhealthy place.

Further, each plaintiff showed that he or she suffered injuries as a result of the nuisance. Each expended extra time and money over a 2 1/2 -year period in trying to maintain decent living conditions. Some carried water from the Embassy of Ghana next door. Some made special arrangements for their personal security. In addition, because of conditions on the premises, all of them experienced mental anguish, uncertainty and fear. Some were isolated from friends and family who would not come into the building. Others lost concentration and/or experienced physical illness such as aggravation of nose and throat problems, nausea, headaches and high blood pressure.

Plaintiffs established "special damages." B&W Management, supra at 882. Their injuries were not injuries shared by the general public. In arguing that plaintiffs failed to prove "special damages," defendants may have misread the pretrial order and mistakenly interpreted "special damages" as "out-of-pocket" expenses.

Defendants were vigorous in advocating their defenses. They contended and offered evidence that:

-- Plaintiffs "came to the nuisance" by "electing" to remain in the building.

-- Plaintiffs did not take reasonable steps to avoid or mitigate their losses.

-- Plaintiffs failed to take reasonable steps to maintain the property, including failure to give access for repairs and failure to report need for repairs.

-- Plaintiffs failed to show that defendants' actions were intentional.

The defense evidence and arguments, however, did not entitle defendants to judgment as a matter of law. At most, the defense created issues of fact for the jury, and ultimately the jury acted within its province when it rejected the defenses and accepted the plaintiffs' ample evidence of nuisance and injury.

Intentional Infliction of Emotional Distress:

Intentional infliction of emotional distress requires proof that:

-- Defendants engaged in conduct which was extreme and outrageous.

-- Defendants acted intentionally or recklessly.

-- Defendants' conduct caused "severe emotional distress."

Sere v. Group Hospitalization, Inc., 443 A.2d 33, 37 (D.C. 1982), quoting Restatement (Second) of Torts § 46 (1965). The conduct must "go beyond all possible bounds of decency, and . . . be regarded as atrocious, and utterly intolerable in a civilized community." Restatement, supra, comment at 73. Intent or recklessness may be inferred from the outrageousness of the conduct. Waldron v. Covington, 415 A.2d 1070, 1077 (D.C. 1980). Further, although actual physical injury need not be proved, "the emotional upset must be of so acute a nature that harmful physical consequences might be not unlikely to result." Clark v. Associated Retail Credit Men, 70 U.S. App. D.C. 183, 186, 105 F.2d 62, 65 (1939).

As noted in discussing the claim of nuisance, plaintiffs' evidence showed dreadful living conditions at Park Towers. In addition to filth and debris, there was incompetent demolition work resulting in such hazards as uncapped gas pipes. "Security" guards were drunk. Strangers roamed the halls. A jury could reasonably conclude that the conduct which created or permitted these conditions was "extreme and outrageous."

Plaintiffs also offered substantial evidence that those conditions were intentionally and purposefully created by the defendants and their agents. The events which occurred in the building were not attributable solely to its age and natural deterioration. The direct evidence, the circumstantial evidence and the reasonable

inferences permitted a jury finding that defendants intentionally engaged in outrageous conduct with a view to causing plaintiffs to leave the premises. Further, the evidence provided ample basis for a finding that all defendants knew what was occurring and its impact on plaintiffs. Jonathan Woodner and Steve Laufer came to the premises. They received oral and written communications from plaintiffs about the conditions and about the actions of defendants' employees or agents. In addition, Mr. Woodner communicated regularly with his father who was president of the Company.

To prove "severe emotional distress," plaintiffs offered evidence of terrifying experiences caused by defendants' employees. Conditions in the building were linked to mental stress, anxiety and anguish. The frequent fires caused at least one plaintiff to have nightmares and hallucinations about fire. Another plaintiff developed a phobia about elevators. Some plaintiffs became highly nervous and distraught. Several experienced actual physical symptoms including headaches and grinding of teeth. There were sleep problems and depression. Many recounted incidents of shock, fright, embarrassment and/or humiliation. These injuries were not de minimus. They were at least as severe as the mental anguish held to constitute "severe emotional distress" in Robinson v. Sarisky, 535 A.2d 901, 905-906 (D.C. 1988).

Compensatory Damages

The compensatory damages in this case range from $15,000 to $50,000 per plaintiff for nuisance and from $75,000 to $80,000 per plaintiff for intentional infliction of emotional distress. In total, plaintiffs each received between $90,000 and $130,000 for injuries allegedly sustained as a result of defendants' actions over a period of 2 1/2 years. The damages were awarded as follows:

	Nuisance	Intentional Infliction of Emotional Distress
For Elise Joyner	$50,000	$80,000
For Francisca Breeden	$50,000	$80,000
For Archie McCallum	$15,000	$75,000
For Muriel Cardenas	$25,000	$80,000
For Margaret Adams	$25,000	$75,000
For Stanley Poindexter	$15,000	$75,000
For Winslow Spady	$15,000	$75,000
For Lydia Headecker	$25,000	$75,000
For Clarece Walker	$50,000	$80,000

In light of the evidence and contrary to defendants' contentions, these compensatory verdicts are not excessive. At a maximum, some plaintiffs were awarded about $145 per day for inconvenience, discomfort, anxiety, terror and emotional distress. While many persons would not have elected to live in those circumstances, plaintiffs had no duty to leave. They did not "come to the nuisance." The evidence showed that the nuisance was created while they had a legal right to remain on the premises. Court orders allowing their eviction were not obtained until December 18, 1980.

In computing nuisance damages, the jurors were instructed to consider:

-- Annoyance, inconvenience or discomfort suffered by a plaintiffs.

-- Extent and duration of physical injury.

-- Damage or loss to property.

-- Any other expense incurred as a result of the nuisance.

They were told how to deal with aggravation of any pre-existing physical or mental condition and how to deal with the doctrine of avoidable consequences. They were required to divide the damages into two time periods (August 1978 to June 1979 and July 1979 to

March 1981) to accommodate the later time at which Mr. Laufer joined the project. No award for loss of the enjoyment or use of the premises was permitted. The diminution of rental value had been dealt with in prior litigation.

In computing damages for intentional infliction of emotional distress, the jury knew that it could consider:

-- Severe mental suffering or mental anguish, including shock, fright, horror, embarrassment and/or humiliation.

-- Any physical harm resulting from the distress.

-- Any past or future medical expenses.

They were instructed on how to deal with continuing injuries and were reminded that they could not give double compensation.

The evidence of injury was substantial. Every plaintiff was adversely affected. Supra at 11 and 14. The absence of extensive "out-of-pocket" expenses does not diminish the value of their claims. "Out-of-pocket" expenses are not the sole measure of an injury. Phillips v. District of Columbia, 458 A.2d 722, 725 (D.C. 1983). Moreover, a party cannot be deprived of compensatory damages "merely because they cannot be computed with exactitude." Spar v. Obwoya, 369 A.2d 173, 180 (D.C. 1977).

In this case, the jurors appraised the unliquidated damages and assessed the value of mental or emotional injury. Their decision was not contrary to the weight of the evidence. They worked carefully on an elaborate verdict form separating plaintiffs, defendants and time periods. There is every indicia of a reasonable and rational approach by this jury in assessing compensatory damages. The amounts are not "beyond all reason" and do not "shock the conscience of the court." Wingfield v. Peoples Drug Store, Inc., 379 A.2d 685, 687 (D.C. 1978).

Punitive Damages

On April 25, 1989, after a separate proceeding on punitive damages, the same jury which heard the evidence on compensatory damage issues assessed $15 million in punitive damages. The awards were as follows:

Against Jonathan Woodner Co.	$9,000,000
Against Estate of Jonathan Woodner	$1,500,000
Against Steve Z. Laufer	$4,500,000

Defendants contend, inter alia, that these awards of punitive damages are unconstitutional, that they are excessive and that plaintiffs' improper conduct and misuse of evidence requires a new trial.

Constitutional Issues: Defendants argue that Fifth and Eighth Amendments to the Constitution of the United States bar plaintiffs' claims for punitive damages.

After this case was tried, the United States Supreme Court addressed the issue of the Eighth Amendment as bar to punitive damages. Browning-Ferris Industries v. Kelco Disposal, Inc., et al., ___ U.S. ___, 109 S.Ct. 2909, 2914 (1989). The Court said at 2914:

> Whatever the outer confines of the Clause's reach may be, we now decide only that it does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded. To hold otherwise, we believe, would be to ignore the purposes and concerns of the Amendment, as illuminated by its history.

Because this case is not one in which the government was the prosecutor or had any right to receive a share of the damages, defendants must concede that the Eight Amendment does not bar the award of punitive damages to these plaintiffs.

The only remaining Constitutional issue is defendants' contention that this case presents circumstances in which

an award of punitive damages would violate the Fifth Amendment to the Constitution. They assert that:

-- The standards for assessing punitive damages in the District of Columbia are so vague that there is a taking of property without due process.

-- The standard for proving punitive damages must be "clear and convincing" evidence if the imposition of punitive damages is to pass Constitutional muster.

Defendants' contention that the law of the District of Columbia on punitive damages is "vague" must be rejected. Punitive damages may be awarded when there is evil motive, actual malice, deliberate violence or oppression. Price v. Griffin, 359 A.2d 582, 589 (D.C. 1979). Stated another way, if there is "outrageous conduct . . . in willful disregard for another's rights," punitive damages are appropriate. Vassiliades v. Garfinckel's, et al., 492 A.2d 580, 593 (D.C. 1985). The District of Columbia cases also speak to the manner in which state of mind may be proved and to the factors which may be considered in awarding punitive damages. Robinson v. Sarisky, 535 A.2d 901, 907 (D.C. 1988); Town Center Mgt. Corp. v. Chavez, 373 A.2d 238, 246 (D.C. 1977).

Defendants' contention that punitive damages must be proved by "clear and convincing" evidence also must be rejected. In Smith v. Wade, 461 U.S. 3053 (1983), in a slightly different context, the Supreme Court declined to hold that the "threshold" for punitive damages must be higher than the "threshold" for compensatory damages. It follows that there is no basis for requiring the higher threshold of "clear and convincing" evidence for punitive damages while assigning a threshold "preponderance of the evidence" to compensatory damages.

In sum, there is no Constitutional basis for setting aside the award of punitive damages.

Punitive Damages Against an Estate: The Estate of Jonathan Woodner also contends that claims for punitive damages cannot be maintained against an estate after the death of the alleged tortfeasor.

The Estate offers cases from other jurisdictions to support its proposition, but the law of the District of Columbia is different. The District of Columbia Survival Act, as amended in 1978, had a broad reach. "All" accrued causes of action survive the death of a tortfeasor. D.C. Code § 12-101 (1981 Ed.). The reasons for allowing punitive damages against the estate of a deceased tortfeasor are set forth more fully in the Memorandum of Decision and Order dated December 8, 1988 which is incorporated by reference. The trial court, therefore, rejects this contention.

Evidence of Authorization/Ratification: Defendants also suggest that the punitive damage verdicts should be set aside because the evidence of authorization/ratification was insufficient to hold either the corporation or the individual defendants responsible.

A principal or corporation may not be held liable in punitive damages for the acts of others unless those acts are authorized or ratified. Dart Drug, Inc. v. Linthicum, 300 A.2d 442, 444 (D.C. 1973); Remeikis v. Boss & Phelps, Inc., 419 A.2d 986, 992 (D.C. 1980). Authorization or ratification may be shown, however, by circumstantial evidence. Franklin Investment Co., Inc. v. Smith, 383 A.2d 355 (D.C. 1978). Reasonable inferences may be drawn from the evidence as a whole.

In this case, there was evidence that Jonathan Woodner, the corporate vice-president, and Steven Laufer, a general partner in the development, actually participated in some acts meriting punitive damages. As noted supra at 13, the individual defendants visited on the premises at Park Towers. One or both of them made decisions about security. They authorized the demolition which proceeded at random locations in the build-

ing. They knew the conditions in the building. Tenants' complaints about some employees whose behavior created danger and fear were communicated to them. Instead of ameliorating conditions or hiring competent personnel, defendants continued to employ the same persons, some of whom appeared at trial, but apparently did not find favor with the jury. On at least one occasion, the corporate vice president exacerbated the situation by supplying alcoholic beverages to his employees.

Amendment of the Ad Damnum: In seeking to set aside the punitive damage award, defendants next contend that the trial court was in error in permitting an amendment of the ad damnum clause.

On April 11, 1989, plaintiffs sought leave to amend the ad damnum clause on their punitive damage claim from $500,000 to $10 million for each plaintiff. The trial court exercised its discretion and granted the requested relief on April 11, 1989. The authority for the action is found in Miller v. District of Columbia, 479 A.2d 329 (D.C. 1984) and it follows that defendants' contention in this regard is not well taken.

Bifurcation/Trifurcation: Although defendants were initially satisfied with bifurcation of the issues of compensatory damages and punitive damages, they sought a trifurcation of issues just before the jury was to hear matters relating to punitive damages. Defendants sought (1) a proceeding in which the jury decided whether punitive damages should be awarded and (2) a later proceeding, if necessary, to determine the amount of punitive damages. Defendants feared the impact of financial information on the first decision.

The request was denied. It was both untimely and unworkable. Issues of liability and amount are not easily severable. For example, evidence of the nature of the wrong and evidence of state of mind are relevant both to the malice on which liability for punitive damages rests and to the amount of a punitive damage award.

Moreover, the limited nature of the financial information which was ultimately received also indicates that trifurcation was inappropriate and unnecessary. Very little trial time was spent on financial matters. Financial information paled in comparison to evidence on other factors relevant to an award of punitive damages.

Excessiveness of Punitive Damages: Defendants also suggest that the award of $15 million in punitive damages in this case was excessive and was the result of passion, prejudice or mistake. They contend, inter alia:

- -- The evidence does not support an award of $15 million in punitive damages.
- -- The award of punitive damages is disproportionate to actual damages.
- -- Plaintiffs purposefully misrepresented the financial condition of defendants.
- -- Plaintiffs improperly offered evidence of events occurring during litigation and improperly testified about mediation and settlement.
- -- Evidence of defendants' attorney fees was improperly received.

For these reasons, defendants ask for either a new trial or a remittitur.

In considering allegations of excessiveness, it is important to note the factors which a jury may consider in determining an appropriate amount to award if punitive damages are justified. The standard jury instructions identify (1) net worth of the defendant, (2) nature of the wrong, (3) defendants' state of mind, and (4) attorneys fees. Case law in the District of Columbia and elsewhere expands on the meaning of these factors sometimes rephrasing them to include "duration of the litigation" and "profitability of conduct." Robinson, supra at 907; Town Center, supra at 246; Hawkins v. Allstate Insurance Company, 152 Ariz. 490, 497-498,

733 F.2d 1073, 1080-81, cert. denied, 108 S.Ct. 212, reh. denied 108 S.Ct. 477 (1987).

Punitive damages, however, focus on the wrong which was done. Washington Post Co. v. O'Donnell, 43 App. D.C. 215, 240, cert denied, 238 U.S. 625 (1915). Plaintiffs are not required to offer evidence on each of the possible factors. Proof of financial capacity to pay punitive damages is not required. Town Center, supra at 246, citing Tri-Tron International v. Velto, 525 F.2d 432, 438 (9th Cir. 1975).

Further, an award of punitive damages may not be reduced unless it is "grossly excessive." Robinson, supra at 907, quoting Franklin Investment Co. v. Hamburg, 252 A.2d 93, 99 (D.C. 1969). In determining whether an award of punitive damages is "grossly excessive," the trial court is guided by May Department Stores Company, Inc. v. Devercelli, 314 A.2d 767, 770 (1973):

> The question is whether the amount of the verdict in this case, regardless of its comparative size, was the result of passion, prejudice or mistake. Each case in this area necessarily rises or falls on its own facts and the trial court in ruling on the question of whether or not a jury verdict is excessive must determine on the totality of facts before it whether it was the result of passion, prejudice or mistake.

The mere size of a punitive damage verdict is not a basis for concluding that it is excessive. The key is whether the verdict is the result of "passion, prejudice or mistake." The reviewing court must ask whether

> [T]he jury have committed some very gross and palpable errors, or have acted under some improper bias, influence or prejudice, or have totally mistaken the rules of law by which the damages are to be regulated. . . .

Barry v. Edmonds, 116 U.S. 550, 556 (1885).

Trial by jury becomes trial by the court if the trial court lightly substitutes its dollar amount for the dollar amount awarded by a jury in a properly tried case. This is particularly true where a jury is called upon to determine what amount will deter defendants and others. Bar Assoc. of D.C., Standardized Civil Jury Instructions 171 (1981).

Size/Disproportionality: Turning to this case, the trial court cannot say that punitive damage verdicts of $15 million in and of themselves reflect passion, prejudice or mistake. The jurors were dealing with wrongs for which there is no remedial formula. A computer cannot be used to calculate the number of dollars needed to deter the wrongs. Further, disproportionality between actual and punitive damages does not provide a basis for trial court action. The Supreme Court warns against crafting "some common-law standard of excessiveness that relies on notions of proportionality between punitive and compensatory damages." Browning-Ferris, supra at 2922.

Plaintiffs presented a strong case for punitive damages. The evidence of defendants' wrongful action was devastating. It supports a substantial award of punitive damages. In the absence of an "improperly functioning jury," substitution of court judgment for jury judgment must be approached most cautiously. Mobile Dodge, Inc. v. Alford, 487 So.2d 866, 871 (1986), cert. denied 108 S.Ct. 2008 (1988).

Financial Information: The more difficult issue in dealing with punitive damages in this case is the impact of the financial information which plaintiffs proffered to the jury. Although plaintiffs were not required to offer any financial information in seeking punitive damages, Town Center, supra at 24, they elected to do so and proceeded as follows:

-- Plaintiffs' referred in opening statement to a net worth of over $100 million for Jonathan Woodner

Company and to the substantial net worth of the other defendants. Tanner TR, April 18, 1989 at 86.

-- Although no balance sheets showing the net worth of the Jonathan Woodner Company or the Estate were offered, at least five exhibits relating to assets of Jonathan Woodner were received. These showed properties owned by the Jonathan Woodner Company, its loan agreements, the completion of projects having a total cost of $250 million and a potential gross profit of up to $7 million on conversion of Park Towers. Pl. Exs. 3D, 2BB, 2VV, 44I and 44L.

-- Testimony was received concerning the Estate's ownership of 6.25% of Shipley Corporation, the parent of Jonathan Woodner Company, but no value of the Shipley Corporation was offered.

-- Evidence of Steven Laufer's net worth included balance sheets from 1982 and 1984 showing net worths of $11.2 million and $19.6 million and his testimony about debts and losses since 1984 which give him a negative net worth. Pl. Exs. 2ZZZ and 46B.

-- In closing argument, plaintiffs suggested to the jury that:

- Punitive damage awards of $1.5 million and $4 million would not be sufficient to punish the Jonathan Woodner Company. A percentage approach was recommended and the profitability of the Park Towers conversion was mentioned. Tanner TR, April 24, 1989 at 55-56.

- The Estate's net worth included the value of the Shipley asset for which a value of $82 million was computed. Tanner TR, supra at 48.

- Mr. Laufer had assets in excess of $7½ million. Tanner TR, supra at 50-51.

- The award of punitive damages should be "sufficient to catch the attention of people like Donald Trump, a billionaire, and other persons who are multinational, international real estate developers . . . ." Tanner TR, supra at 62.

Defendants allege that plaintiffs' presentation of financial information was inaccurate and misleading and caused the jury to speculate and be biased on matters of punitive damage.

The District of Columbia, like most jurisdictions, permits plaintiffs and defendants alike to present financial information during punitive damage proceedings. "In cases where it is competent for plaintiff to prove the wealth of the defendant to increase damages, it is equally competent for the defendant to show a want of it to diminish them." Rinaldo v. Aaron, 314 So.2d 762, 765 (Fla. 1975), citing Sutherland, Treatise on Damages § 404 at 1315 (1916).

A plaintiff is not required to accept a defendant's statement of net worth or to construct a complete balance sheet when presenting financial information. "Figures of gross wealth are at least relevant to the issue of punitive damages." Vossler v. Richard Mfg., 143 Cal.App.3d 952, 967, 192 Cal.Rpt. 219, 228 (1938). Likewise, a plaintiff may use evidence of previously held assets to show dissipation or concealment of wealth.[3]

The defendant, however, in seeking to avoid the possible consequences of a large punitive damage verdict, carries the burden of establishing financial

[3] Defendant Laufer's assertion that he was "surprised" by the evidence of his 1982 and 1984 net worth statements is not well taken. Pl. Exs. 2ZZZ and 46(b) were well known to all parties. Further, a belief that a discovery order is a ruling on admissibility has no legal merit.

conditions. As noted in Zarcone v. Perry, 572 F.2d 52, 56 (2nd Cir. 1978):

> [T]he decided cases and sound principle require that a defendant carry the burden of showing his modest means -- facts peculiarly within his power -- if he wants this considered in mitigation of damages. [Citations omitted].

It is "incumbent" on a defendant to present evidence of net worth to avoid assessment of a harsh penalty. Evering v. Smithwick, 526 So.2d 185, 186 (Fla. 1988).

In this case, the financial information which plaintiffs offered came from defendants. Defendants knew what to expect and had ample opportunity to rebut the evidence and/or guide the jury to a proper interpretation of the evidence. For whatever reasons, defendants virtually bypassed their opportunity to guide the jury. No current financial statements were offered. They left the jury with a limited basis on which to perform its function in assessing punitive damages. See, Woods-Drake v. Lundy, 667 F.2d 1198, 1203 n. 9 (5th Cir. 1982).

It must also be noted that defendants' objections to plaintiffs' closing argument on financial matters were dealt with promptly. The court gave curative instructions immediately and expanded on them at the close of the case. Tanner TR, supra at 55-56 and Burns TR, April 14, 1989 at 23-29. We cannot assume that these jurors failed to follow instructions. They were attentive, followed instructions in completing the verdict forms and gave every indicia of being able to evaluate and interpret evidence in light of the detailed instructions. Evening Star Newspaper v. Gray, 179 A.2d 377, 382 (D.C. 1962). Moreover, the closing remarks to which defendants object are less egregious than in other cases which have required reversal. E.g., Villacres v. United States, 423 (D.C. 1976); United States v. Phillips, 155 U.S. App. D.C. 93, 476 F.2d 538 (1973).

All things considered, the trial court cannot find that the jury made mistakes based on either the financial information or the argument. The financial issues in this case were vastly outweighed by the nature of the wrong and the defendants' state of mind. Errors in presentation of this information, if any, are attributable in part to defendants' choice and are outweighted by the overwhelming evidence of wrongful conduct. Villacres, supra at 428. In the trial court's view, the jury gave great weight to the nature of the wrong and did not believe the Jonathan Woodner Company when it suggested evidence establishing a net worth of $1½ million. It did not believe the Estate of Jonathan Woodner when it suggested evidence of its net worth in the range of $207,000. It did not believe Steven Laufer when he testified about a "negative net worth."

Other Evidence: Defendants next suggest that, during punitive damage proceedings, the trial court improperly received evidence of events which occurred while this case was in litigation. They objected, inter alia, to evidence of plaintiffs' hardships during litigation and to the evidence about mediation proceedings. They contended that receipt of this evidence violated Pretrial Order No. 2.

The law of the District of Columbia permits a jury to consider a wide range of events which occur during litigation if punitive damages are in issue. Events which occur during litigation come into evidence because they are relevant to costs of litigation, to duration of litigation or to a defendant's state of mind. Robinson, supra at 907; Town Center, supra, at 246.

In this case, there was evidence that a decade of litigation had disrupted the plaintiffs' lives and that they had incurred costs in pursuing the litigation. There was also some evidence of harassment attributable to defendants during litigation as well as some evidence of purposeful delay and complication of litigation. In addition, evidence was received about defendants' behavior

concerning plaintiffs' evictions and housing problems after litigation commenced. Such proof was relevant to costs and duration of litigation as well as to remorse and state of mind and was not barred by Pretrial Order No. 2 which was directed to compensatory damages.

The jury's receipt of evidence on what occurred pending trial was not a "back door" supplement on compensatory damages. The evidence related to punitive damage factors. Moreover, the jury was fully advised in final instructions on how to deal with the evidence. They were told that many delays in cases are attributable to causes other than defense tactic. They were also told that mediation was a normal and proper part of litigation. Burns TR, supra at 21-22. They knew that the evidence had to be proved by a preponderance of the evidence and that they could not speculate on matters such as alleged harassment if it were not proved by a preponderance of the evidence.

The trial court also rejects defendants' suggestion that the jury was influenced improperly by reference to mediation and settlement offers. The fact that mediation sessions occurred is relevant to the cost and duration of litigation. No confidentiality attaches to the convening of a mediation session. Further, the few words of testimony implying a "peanut sized" settlement offer did not impact on the ultimate verdict. The transcript shows that the words were virtually hidden in more general testimony on mediation and the duration of litigation. Whalen TR, April 18, 1989 at 57 and 89-90. The reference to settlement was not a highlight of the testimony and was not noted in argument.

Attorney Fees: Defendants' last contention in seeking to set aside the award of punitive damages involves receipt of evidence showing that the firm of Shaw Pittman Potts & Trowbridge billed the Estate of Jonathan Woodner the sum of $558,000 for services during a prior trial of this case. Defendants assert that evidence of an opponent's fees cannot be used by a jury

when it considers attorney fees as one factor in awarding punitive damages.

In this case plaintiffs' evidence of an opponent's attorneys fees was but one part of their proof. They offered estimates of time spent by their counsel, by associate counsel, by paralegals and by themselves. They described the volume of pleadings and exhibits. However, because plaintiffs' case was handled by the Neighborhood Legal Services, there were no bills. Defendants' bill, therefore, whether paid or not, provided evidence of the prevailing rates and the dollar value of reasonable attorneys fees to which Legal Service attorneys are entitled in measuring the value of their services. Habib v. Thurston, 517 A.2d 1, 8, n. 12 (D.C. 1985). See Martin v. Tate, 492 A.2d 270, 274 (D.C. 1985); Blum v. Stenson, 465 U.S. 886, 895 (1984).

Defendants' reliance on Synanon Foundation, Inc. v. Bernstein, 517 A.2d 28, 39 (D.C. 1986) is not persuasive. The case did not involve an award of punitive damages. Moreover, the 1851 Supreme Court case noted by the appellate court arose in Massachusetts and did not recognize the District of Columbia's adherence to the minority rule which allows attorneys fees as a factor to be considered in punitive damages.

Conclusion

This lengthy discussion of the issues raised in defendants' motion should not lead to the conclusion that there are legal or factual problems of unusual dimension in this case. Rather, the length is attributable to the trial court's effort to articulate its consideration of each of defendants' contentions and to explain why none of the contentions, separately or in combination, requires a setting aside of the verdicts or a remittitur.

The bottom line is that, in this case, the jury functioned properly. It was not mislead or swayed by emotion. It followed curative instructions where necessary and

displayed an ability to follow quite sophisticated legal/factual distinctions.

There was no miscarriage of justice when the jury acted within its province in crediting plaintiffs' testimony and rejecting defendants' presentation. Neither was there a miscarriage of justice when the jury gave its collective view on the dollar value of such unmeasureables as annoyance, discomfort and emotional distress nor when it gave its collective view on the amount of money which would deter future conduct of the type displayed by the evidence in this case.

Order

For the reasons discussed above, it is this 23rd day of March, 1990,

ORDERED that defendants' request for judgment notwithstanding the verdict, involuntary dismissal, mistrial, new trial and remittitur are denied.

/s/

SYLVIA BACON
ASSOCIATE JUDGE
D.C. SUPERIOR COURT

Copies to:

Roy L. Pearson, Jr., Esq.
NEIGHBORHOOD LEGAL SERVICES
701 Fourth Street, N.W.
Washington, D.C. 20001

Arthur D. McKey, Esq.
HANSON, O'BRIEN, BIRNEY & BUTLER
888 - 17th Street, N.W.
Suite 1000
Washington, D.C. 20006

John J. Dillon, Esq.
MONTEDONICO & MASON, CHARTERED
110 N. Washington Street
Fifth Floor
Rockville, Maryland 20850

B. Michael Rauh, Esq.
LANDIS, COHEN, RAUH & ZELENKO
1019 - 19th Street, N.W.
Suite 500
Washington, D.C. 20036

Gregory Wells, Esq.
FARRINGTON, SMALLWOOD & WELLS
9200 Basil Court
Suite 204
Landover, Maryland 20785

APPENDIX C

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CIVIL DIVISION (EXCERPT)

----------x

ELISE JOYNER

VS. No. CA 12817-90

JONATHAN WOODNER COMPANY, et al.,

Defendant,

----------x

Washington, D.C.

Thursday, February 23, 1989

The above-entitled action came on for voir dire of jury trial before the Honorable Sylvia Bacon, Associate Judge, in Courtroom No. 33, commencing at approximately 10:00 a.m.

THIS TRANSCRIPT REPRESENTS THE PRODUCT OF AN OFFICIAL REPORTER, ENGAGED BY THE COURT, WHO HAS PERSONALLY CERTIFIED THAT IT REPRESENTS HER ORIGINAL NOTES AND RECORDS OF TESTIMONY AND PROCEEDINGS OF THE CASE AS RECORDED

APPEARANCES:

On behalf of the Plaintiffs::

Roy L. Pearson, Esquire
Neighborhood Legal Services

On behalf of the Defendant Jonathan Woodner Company:

John Dillon, Esquire
Montedonico & Mason, Chtd.

* * * *

[14] THE COURT: This matter comes before the Court on a motion joined by all defendants to strike from the jury box those jurors who have been called forward for service in this case. The basis for the motion is the application of the Batson case in civil actions and the use by plaintiff's counsel of their challenges, as a matter which removed from the jury the only white persons, caucasian persons who were available for selection to serve as the six primary jurors, those being jurors number 631 and 642.

Out of the group of 12 persons, that is the six who would serve and the six who were available for challenge, the racial composition [15] was two out of twelve, approximately 16 percent white persons. The striking of all of those persons in the Court's view is a prima fascia showing from which inferences of discrimination may be drawn and which places the burden then upon the party exercising those challenges to give an explanation.

The explanation before the Court is that these persons were struck, among other reasons, because of the hardship which they claimed in light of their employment obligations. Among the group of 12 of available persons, four of those persons answered the questions, numbers one and two, indicating that they had some job related concerns.

Of those four, two were white, two were black. Plaintiff's counsel in his case did not exercise challenges against black persons who indicated, for example, as juror number 605, that her job was short of help or juror 627 who indicated that he would not be able to complete work assignments, or as to number 658 who had a school commitment and spoke with three black persons who answered the first two questions in a manner that would indicate not necessarily a job, [16] but if you add the school hardship.

When we face only employment difficulty, the neutrality of the explanation as based purely on the job, becomes quite thin.

The Court further notes that on each of these individuals we made inquiry at the bench. One of the black women indicated to us that indeed she guessed she could make it; they could find somebody. Likewise, the white women who was struck indicated that while it was a hardship, they could manage, and that a lot of people faced hardships.

On the basis of that explanation and the data the Court has before it, it is hard pressed to find an explanation other than race for selecting between two women, both relatively young, both of whom first expressed some difficulty and then indicated they could manage.

MR. PEARSON: Your honor, if I may supplement the record. My clients have waived the privilege somewhat with respect to juror number 642, and among the things that we considered that she was a home owner—

THE COURT: You're interrupting me, Mr. [17] Pearson? The Court's making its ruling.

MR. PEARSON: Pardon me, Your Honor?

THE COURT: The Court is making its ruling. I'll trust that you would not interrupt me.

MR. PEARSON: Very well, Your Honor.

THE COURT: The Court is aware, however, of many attorneys practicing in this jurisdiction who regularly ask that all persons who state that they have job related reasons for not serving be excused from service, and thereafter exercise their discretion if challenge for cause is not granted to remove those persons, sometimes articulating a theory that they wish jurors with no reservations.

In this case, as the Court recalls the presentations of the jurors 605 and 642, there was some difference in the

quality of their concern in their devotion to their employment and their employer. The Court can, therefore, on the theories previously articulated give some edge to the neutrality of the explanation in that instance.

Likewise, in comparing responses of juror 627 and 631 in terms of their devotion to [18] employment, it reflects potential distraction if required to serve. The Court must conclude that there would be some edge to neutrality of explanation.

Therefore, while the Court is distressed by what certainly is a prima fascia showing of a racist exercise of peremptory challenge, the Court accepts as an officer of the Court and will trust counsel's integrity in stating the reason, among others, as being employment. Beyond that, the Court finds a slim factual margin that favors the neutral explanation.

The motion to remove the jurors from the box is denied.

* * * *

APPENDIX D

District of Columbia Court of Appeals

No. 90-CV-362 [July 25, 1996]

JONATHAN WOODNER CO., ET AL.,

Appellants,

CA12817-80

v.

FRANCISCA BREEDEN, ET AL.,

Appellees.

BEFORE: **Wagner, Chief Judge; **Ferren, Terry, *Steadman, SCHWELB, *Farrell, *King, Ruiz, and Reid, Associate Judges.

ORDER

On consideration of appellants Jonathan Woodner Company and Stephan Z. Laufer's petition for rehearing or rehearing en banc, the opposition thereto, appellees' motion to extend time to file petition, appellees' lodged petition for rehearing or rehearing en banc, the opposition thereto, appellees' motion to supplement petition, appellants' motion for leave to respond to motion to supplement, the opposition thereto, the lodged response, appellants' motion to extend time to file reply to opposition, the lodged reply to opposition to motion to supplement, appellees' motion to correct errors in slip opinion, appellants' motion for leave to respond to motion to correct errors, the opposition, and the reply thereto, and the lodged response, it is

---

** Chief Judge Wagner and Associate Judge Ferren have recused themselves from this case.

ORDERED that the motions are granted and the Clerk is directed to file the lodged appellees' petition for rehearing or rehearing en banc, the lodged appellants' response to motion to supplement petition, and the lodged appellants' reply to opposition to motion for leave to respond to motion to correct errors in slip opinion. It is

FURTHER ORDERED by the merits division• that appellants' petition for rehearing is denied. It is

FURTHER ORDERED by the merits division• that appellees' petition for rehearing is granted only to the extent that the following new sentence shall be added at the end of the first paragraph of footnote 19 of the opinion filed September 14, 1995: "We do not reach any issues relating to proof of net worth where the plaintiff is not seeking an award of punitive damages based upon the wealth of the defendant, as the plaintiff did here. *See Town Center Management Corp. v. Chavez*, 373 A.2d 238, 246 (D.C. 1977)." It is

FURTHER ORDERED by the merits division• that the appellees' motion to correct errors in slip opinion is granted only to the extent that the second sentence of the final paragraph of Part I of the opinion filed September 14, 1995, is amended as follows: "$30,000" should read "$15,000" and "$60,000" should read "$75,000."

It appearing that no judge of this court has called for a vote on the petitions for rehearing en banc, it is

FURTHER ORDERED that the petitions for rehearing en banc are denied.

PER CURIAM

Copies to:

Honorable Peter H. Wolf

Clerk, Superior Court

Walter A. Smith, Jr., Esquire
555 13th Street, NW
Washington, DC 20004-1109

John J. Dillon, Esquire
5301 Wisconsin Avenue, NW, Suite 400
Washington, DC 20015

B. Michael Rauh, Esquire
1501 M Street, NW, Suite 700
Washington, DC 20005

Gregory K. Wells, Esquire
1801 McCormick Drive, Suite 220
Landover, MD 20785

Joseph B. Whitebread, Jr., Esquire
1666 K Street, NW, Suite 1100
Washington, DC 20006

Roy L. Pearson, Esquire
701 4th Street, NW
Washington, DC 20001

sl

Supreme Court, U.S.
FILED
DEC 26 1996
CLERK

(2)

No. 96-821

In The

Supreme Court of the United States

October Term 1996

JONATHAN WOODNER CO., et al.,

Petitioners,

v.

FRANCISCA BREEDEN, et al.,

Respondents.

On Petition For Writ Of Certiorari To The District Of Columbia Court Of Appeals

BRIEF FOR THE RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROY L. PEARSON, JR.
Counsel of Record

Neighborhood Legal Services Program
701 Fourth Street, N.W.
Washington, D.C. 20001
(202) 682-2723

December 26, 1996

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

38 pp

QUESTION PRESENTED FOR REVIEW

The Question related to jury selection identified in the Petition does not arise on the record in this action. Rather, were this Court to review the judgment below, the *only* jury selection issue that it would be called upon to decide would be the following:

Whether petitioners can make the "very obvious and exceptional showing of error," *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949), that would justify this Court's review of the factual finding, concurred in by two courts below, that plaintiffs' counsel did not exercise peremptory strikes on a purposefully discriminatory basis.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

A. FIRST INTENSIVE FACTUAL REVIEW.. 1

B. SECOND INTENSIVE FACTUAL REVIEW 5

C. THIRD INTENSIVE FACTUAL REVIEW... 6

REASONS FOR DENYING THE WRIT 8

I. THE DECISION OF THE COURT OF APPEALS IS PLAINLY CONSISTENT WITH THIS COURT'S PRECEDENTS 9

II. THIS COURT'S "TWO COURT RULE" PRECLUDES A GRANT OF CERTIORARI TO REVIEW THE FINDINGS OF FACT 11

III. THE CONFLICT THE PETITION CLAIMS HAS NO RELEVANCE TO THESE FACTS... 12

CONCLUSION 16

APPENDICES

Appendix 1: Jury Questionnaire of Venireperson 605 ..... 1a

Transcript of Questioning of Venireperson 605 ..... 2a

Appendix 2: Jury Questionnaire of Venireperson 642 ..... 4a

Transcript of Questioning of Venireperson 642 ..... 5a

TABLE OF CONTENTS – Continued

Page

Appendix 3: Transcript of Questioning of Venireperson 631 ..... 8a

Appendix 4: Transcript of Peremptory Strikes 13a

TABLE OF AUTHORITIES

Page

CASES

Batson v. Kentucky, 476 U.S. 79 (1986) ..... *passim*

Branti v. Finkel, 445 U.S. 507 (1980)..... 11

Burks v. Borg, 27 F.2d 1424 (9th Cir. 1994), cert. denied, 115 S. Ct. 1122 (1995)..... 15

Epps v. United States, 683 A.2d 749 (D.C. 1996)..... 15

Exxon Co. U.S.A. v Sofec, Inc., ___ U.S. ___, 116 S. Ct. 1813 (1996) 12

Fludd v. Dykes, 863 F.2d 822 (11th Cir. 1989) 4

Graver's Tank & Mfg. Co. v. Linde Air Products, Co., 336 U.S. 271, rehearing granted on other grounds, 337 U.S. 910 (1949), aff'd, 339 U.S. 605 (1950) 11

Hernandez v. New York, 500 U.S. 352 (1991)..... 10

Jefferson v. United States, 631 A.2d 13 (D.C. 1993) 15

Jonathan Woodner Co. v. Breeden, 665 A.2d 929 (D.C. 1995), as amended, 681 A.2d 1097 (1996) 8

Jones v. Ryan, 987 F.2d 960 (3rd Cir. 1993)..... 14

Little v. United States, 613 A.2d 880 (D.C. 1992)..... 13

Map v. Ryan, 285 A.2d 310 (D.C. 1971) 14

Nelson v. United States, 649 A.2d 301 (D.C. 1994) 15

Purkett v. Elem, 115 S. Ct. 1769 (1995).....8, 9

Tursio v. United States, 634 A.2d 1205 (D.C. 1993) ..*passim*

United States v. Ceccolini, 435 U.S. 258 (1978)..... 12

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, Francisca Breeden, *et al.*, respectfully pray that the Court deny a writ of certiorari to review the judgment of the District of Columbia Court of Appeals entered in this proceeding on September 14, 1995.

STATEMENT OF THE CASE

A. First Intensive Factual Review

This sixteen year old civil case was filed in September of 1980, alleging tort claims by (then) thirteen plaintiffs against three owner-managers of a low and moderate income apartment building in Washington, D.C. The complaint alleged a plan to illegally intimidate, assault and force plaintiffs and other tenants from the apartment building so that it could be converted to a luxury condominium at a profit to the defendants of millions of dollars.

The petitioner-defendants filed counterclaims in response, including one that pointedly interjected and placed competing racial assertions at issue in the case. Defendants' counterclaims for libel, seeking $30 million dollars in damages, alleged that the tenants had defamed them by posting a sign accusing the defendants of racism, greed and a desire to lynch the plaintiff-tenants. In their

formal Reply to the counterclaim the tenants' defenses included the defense of "truth." (R. 314-15, 323-25)[1]

Judge Sylvia Bacon, an experienced and nationally recognized jurist, presided over two trials of the case, one year apart. The first trial resulted in a mistrial when defendant Jonathan Woodner died mid-trial. His estate was substituted as a party. Venirepersons for the second trial were advised that the trial was expected to take six weeks. Twenty-nine members of the venire then asked, in their response to a Juror Questionnaire, to be excused on hardship grounds. Of the twenty-nine, fifteen initially claimed an employment hardship. One of them, number 605 (a black woman), withdrew her employment hardship claim immediately upon being called to the bench for inquiry. **(Appendix 2a)** Plaintiffs' request to excuse numbers 642 (a white woman), **Appendix 5a**, and 631 (a white man), **Appendix 8a**, for "cause," because of their employment-hardship claims, was denied. Defendants *also* sought to strike number 642, for "cause," for the same reason, as well as number 627 (a black man).

The parties requested a six person jury, with six alternates. Each side was permitted three peremptories (a total of six) for selection of the primary jury. Of the twelve persons who potentially could serve as primary jurors, four (numbers 642, 631, 605 and 627) had initially expressed employment concerns – although 605 formally withdrew her employment hardship claim. Plaintiffs' first two peremptory strikes were against 642 (a white

---

[1] Record references ("R." or "Vol.") are to the twelve thousand page record filed with the District of Columbia Court of Appeals.

woman) and 631 (a white man). Before plaintiffs could exercise their third strike, defendants struck 627, a black man and the only remaining person (of the twelve who could potentially serve on the primary jury) who had claimed an employment hardship. Thus, each person who could have served on the primary jury and who made a work-hardship claim, either withdrew it or was struck.

Defendants nonetheless invoked *Batson v. Kentucky*, 476 U.S. 79 (1986), to allege plaintiffs' counsel had "stricken all caucasian jurors [i.e., 642 and 631] from the primary panel," because they were white. (Vol. VII at 6 (KK)). In partial explanation of his strikes, plaintiffs' counsel reminded the trial judge of the work concerns 642 and 631 had pressed on the court before strikes for "cause" were made.

Defendants then made two attempts to establish that plaintiffs' explanation was pretextual. Neither attempt involved a comparison of 642 and 631 to any of the six primary jurors, or involved a request that the trial judge make that comparison. Their first attempt compared 642 and 631 to all twenty-nine members of the venire who originally made hardship claims of any kind:

> The court will note that 90 percent of the jurors, probably 99 percent of the jurors who answered the questionnaire and approach[ed] the bench to explain particular hardships also indicated the same thing [as 642 and 631].

Defendants' second attempt consisted of pointing out that plaintiffs' second and third (of three) strikes during the selection of alternates were also directed to white

persons.[2] A single white juror served as one of six alternates.

Although jury selection took place in February of 1989, Judge Bacon foresaw, even then, the future development of the *Batson* doctrine. The eminent jurist excused the venire to consider the claim that plaintiffs' counsel violated *Batson* by using strikes to "remove[ ] from the jury the only white persons . . . who were available for selection to serve as the six primary jurors. . . . " Judge Bacon also took time to read *Fludd v. Dykes*, 863 F.2d 822 (11th Cir. 1989), which anticipated this Court's extension of *Batson* to civil cases. She then *sua sponte* identified juror 605 (a black woman) and venireperson 627 (a black man) as the only persons (of the first twelve) at all similar to venirepersons 642 (a white woman) and 631 (a white man), who had not been struck by plaintiffs. (Pg. 59a of App. C to Petition) After making an extended oral comparative analysis of 605 (a white woman) with 631 (a black woman), and 642 (a white man) with 627 (a black man), Judge Bacon found that the black and white venirepersons were *not* similar "in the quality of their concern[,] in their devotion to their employment and their employer." (*Id.*) Having found plaintiffs' counsel's explanations were not pretextual, she found no discriminatory intent.

---

[2] The appellate record reveals that plaintiffs' first strike of an alternate was to number 665, a black woman who claimed a hardship because of an evening class. Their third strike of an alternate was to number 690, a white man. By virtue of the strike, 690 was replaced by 694, a white woman. Number 694 served as an alternate during the trial.

B. Second Intensive Factual Review

After plaintiffs' counsel delivered his Opening Statement to the jury, defendants moved for a "dismissal" on the grounds that the Opening Statement "emphasized the racial aspects" of this case. Because it was too early to determine whether plaintiffs would be able to present the evidence outlined in their Opening Statement, Judge Bacon took the motion under advisement [apparently as a "Sword of Damocles"] for the duration of the trial. Defendants renewed their motion at least three times during the trial. Each time Judge Bacon took the motion "under advisement."

Plaintiffs did present the evidence they promised. ("My closing argument has to be anti-climactic, because in my opening statement I attempted to outline for you what the evidence would be in this case. And I think I succeeded in almost every particular.") The trial resulted in judgments in favor of the plaintiffs on all claims, including the counterclaims for libel. At the conclusion of trial, defendants renewed their *Batson* claim as part of their respective post-trial motions to dismiss, for a mistrial or a new trial. None of the motions challenged the jury's verdict on the libel claims.

Judge Bacon awaited the transcription of the entire pre-trial and trial before ruling on the post-trial motions one year later. In a scholarly thirty-three page opinion the judge explained that she had the added advantage of "reviewing the transcript of the jury selection process in its entirety." (Pg. 33a of App. B to Petition) Based on her second exhaustive study and analysis of the facts, she concluded: "[T]he trial court adheres to its finding" regarding counsel's "neutral explanation." (*Id.* at 35a)

Judge Bacon also catalogued defendants' claims regarding plaintiffs' alleged appeals to "racial bias." After a thorough analysis of each claim, and comparison to the record, she found that "[a]lthough racial issues were part of the case, race was not exploited improperly." (*Id.*)

C. Third Intensive Factual Review

In their brief to the D.C. Court of Appeals defendants renewed their claim that plaintiffs pursued a two-part racial strategy at the trial (striking white potential jurors and making "appeals to racism" before the resulting all black primary jury). Their primary legal authority for their *Batson* claim became the intervening decision of the appellate court in *Tursio v. United States*, 634 A.2d 1205 (D.C. 1993). In that case the D.C. Court of Appeals held that in a "racially charged" case it is not enough that a striker can logically explain individual strikes. His explanation must be probed to determine why he treated any similarly situated black and white persons differently.

The adequacy of the record to support Judge Bacon's findings, based on her comparative analysis of jurors stricken and not stricken by plaintiffs' counsel, was a central theme of the petitioners' brief and oral argument in the Court of Appeals. The final colloquy in the oral argument demonstrates a clear understanding on the part of the court below that it should look at the record itself to determine whether Judge Bacon conducted the "probing" comparative analysis that *Tursio* requires:

> MR. SMITH: Let me comment now, briefly, if you'll let me, finally, about *Tursio*.

JUDGE STEADMAN: This is the last one, right?

MR. SMITH: The last point, your Honor.

JUDGE STEADMAN: All right.

MR. SMITH: But maybe the most important. The language of this court's decision, I would suggest to you, is indisputable that we have reversible error in this case. Given that he struck all whites from the jury, and given the powerful statistical case that was presented that these strikes were racially based. This court said:

> To rebut a prima facie showing as strong as appellant's, the prosecutor carried an especially heavy burden.

This court also said:

> The presence of black jurors who possess the same characteristic as the eliminated white jurors indicates, at least in the absence of other material differences, that the prosecutor's explanations were pretextual.

And this court finally concluded that in order to ensure that they were not pretextual, in order to ensure that the prosecutor, here plaintiffs' counsel, met his especially heavy burden, it was the trial court's responsibility to probe, in detail, the differences between the blacks who were not stricken and the whites that were. And it is not true that any such probing occurred on this record. And that creates reversible error.

JUDGE STEADMAN: Well, that last part will speak for itself because we have the transcript.

The appellate court's opinion addressed petitioners' claim that the voluminous record would reveal that: (1) "it is not true that any such probing occurred on this record" and that (2) appeals to race bias were made by plaintiffs. In a fourteen page published opinion issued six months later, *Jonathan Woodner Co. v. Breeden*, 665 A.2d 929-943 (D.C. 1995), the court summed up its *de novo* review of the 12,000 page record by specifically refuting defendants' dual claims: "There is record support for the trial judge's findings that the tenants did not use peremptory challenges in a racially discriminatory manner, and that, while race was an issue, the case was presented to the jury in a 'reasonable manner . . . and race was not exploited improperly . . . ' " *Id.* at 933 n. 5. Among other supportive authorities, the court cited this Court's then-recent decision in *Purkett v. Elem*, 115 S.Ct. 1769 (1995). (*Id.*)

Although defendants subsequently petitioned for rehearing and rehearing *en banc*, their petitions did not challenge the panel's pointed rejection of their *Batson*-related claims.

REASONS FOR DENYING THE WRIT

There are five reasons why a writ of certiorari should not issue to review the judgment of the District of Columbia Court of Appeals. The first three reasons are the converse of the three reasons for review that the Petition claims: (1) any conflict among the appellate courts on the proper use of "comparative analysis" under *Batson* is irrelevant on *these* facts; (2) that issue is therefore not an

"important" one in the context of this case; and (3) for the same reason, this case does not present "compelling circumstances" for resolving the question presented in the Petition.

In addition, there are two affirmative reasons for denying review by certiorari: (4) this Court's "two-court rule" precludes review of findings of fact in which the trial and appellate court have concurred, absent the most exceptional circumstances, and (5) the decision of the trial judge is plainly correct and consistent with this Court's precedents.

For reasons of logic, we elaborate on the five reasons in reverse order.

I. THE DECISION OF THE COURT OF APPEALS IS PLAINLY CONSISTENT WITH THIS COURT'S PRECEDENTS

Respondents' record-studded Statement of the Case makes it plain that this is not a case where *any* appellate court's "comparative analysis," however rigorous, would result in a reversal. It was petitioners' burden to demonstrate that black seated jurors were treated differently than 642 and 631. *Purkett*, 115 S.Ct. at 1770-71. They failed to do so. When the trial judge attempted to do so for them, she found no seated jurors who were comparable to 642 and 631.

Number 627, the black male venireperson the trial judge selected for comparison, never even sat on the jury. The record makes clear he was struck by petitioners using their second peremptory strike, *before* plaintiffs had the

opportunity to strike him with their third peremptory. **(App. 14a)** Plaintiffs' failure to strike him could not be evidence of disparate treatment because he was not available to be struck with plaintiffs' third peremptory.

Number 605, the black female the trial judge selected, formally withdrew her claim of employment hardship before the peremptory strikes began. ("[T]hey can always get a temporary if they need it, you know.") She could not be compared to 642, who asserted that it was as important for her to report to work as it was for Judge Bacon to. ("Just like any of you missing six weeks of work, it would be the same way. You know, I feel like I have a responsible job at work.") In fact, the record shows that *petitioners* twice moved to strike 642, for cause, as a result. ("Your Honor, I believe what she has indicated [is] sufficient *cause* to strike her.") **(App. 6a)**

Nor could 605, who formally withdrew her hardship claim, be compared to 631. Even as the parties were exercising their peremptory strikes, number 631 was frantically working outside the courtroom to be excused from jury service. ("I spoke to my supervisors this morning. . . . They wanted to request that I be excused at this time. . . . We found out this morning we'll have to go through the [Librarian of Congress] . . . ") **(App. 10a)**

On appeal from the trial court's finding that the work-hardship explanation plaintiffs' counsel gave for striking 642 and 631 was credible, petitioners had to show that this finding of fact was "clearly erroneous." *Hernandez v. New York*, 111 S.Ct. 1859, 1869 (1991).

On this record they clearly could not make that showing. Even if the facts relevant to the finding were disputable, the clearly erroneous standard would not be met. *Id.* at 1871 ("[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.")

Similarly, the record reveals no basis for concluding that the trial and appellate court's finding that "race was not exploited improperly" during the trial was clearly erroneous. Petitioners placed their racial motivations at issue by filing a counterclaim for libel. They lost on their claim that plaintiffs libeled them by stating they were greedy, racists and that they wished to lynch people of color. Petitioners did not appeal that adverse judgment. It is the "law of the case."

II. THIS COURT'S "TWO COURT RULE" PRECLUDES A GRANT OF CERTIORARI TO REVIEW THE FINDINGS OF FACT

This Court has, since 1949, erected an even higher standard than "clearly erroneous" as a precondition for reviewing findings of fact when the findings have been concurred in by both a trial *and* appellate court:

> A court of law, such as this Court is, rather than a court for correction of error in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.

Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271, 275 (1949); *Branti v. Finkel*, 445 U.S. 507, 512 n. 6 (1980) ("[W]e decline to review these and other findings

of fact petitioner argues were clearly erroneous."); *United States v. Ceccolini*, 435 U.S. 258, 273 (1978) (J. Rehnquist) (noting the Court's "traditional deference to the 'two court rule' "); *Exxon Co., U.S.A. v. Sofec, Inc.*, 116 S.Ct. 1813, 1820 (1996).

The record demonstrates the petitioners cannot hope to meet the "clearly erroneous" standard. Clearly, then, they cannot meet this heightened threshold standard for any review, at all, of the findings of fact concurred in by the trial court and the District of Columbia Court of Appeals.

III. THE CONFLICT THE PETITION CLAIMS HAS NO RELEVANCE TO THESE FACTS

In an effort to cloak what is unmistakably a request for a fourth review of the facts, petitioners have attacked the method used by the District of Columbia Court of Appeals to determine whether a trial court's findings of fact are clearly erroneous. Petitioners claim the method is insufficiently rigorous by comparison with the "comparative analysis" methodology, principally in use in the Third and Eighth Circuits. Petition at 9-10. The Petition claims that the question of the correct appellate review methodology is an important one and that this case presents "compelling circumstances" for resolving the issue.

Respondents have demonstrated, supra at 9-11, that no methodology would justify a different result on the facts in this record – none of the six seated jurors were at all "comparable" to venirepersons 642 and 631.

But, in fact, petitioners are also wrong on the law. The appellate review methodology used by the District of

Columbia Court of Appeals when there is a showing (not made by these petitioners in the trial court) that similarly situated prospective jurors of different races were treated differently, is *at least* as rigorous as that of the Third and Eighth Circuits.

In 1992 and 1993 the D.C. Court of Appeals *adopted* Third and Eighth Circuit precedent: (1) requiring a comparative analysis when there is a claim that identifiable, similarly situated venirepersons were treated differently for racial reasons, and (2) holding that if that "comparative analysis" results in a finding of disparate treatment, that finding is *per se* evidence that the reason given for the strike was pretextual.

The Eighth Circuit methodology was approved by the D.C. Court of Appeals in *Little v. United States*, 613 A.2d 880 (D.C. 1992). In *Little* the appellate court concluded the defendant had not made out a prima facie case of discriminatory strikes, but nonetheless cited Eighth Circuit authority on how the defendant *could* have established "an inference of discrimination" through use of a comparative analysis:

> In United States v. Johnson, the United States Court of Appeals for the Eighth Circuit held that the voir dire record established an inference of discrimination because the government struck black venirepersons at a disproportionate rate *'and struck blacks who did not respond during voir dire but did not strike whites who similarly did not respond.'* 873 F.2d at 1140.

Id. at 887. (emphasis added)

One year later, in *Tursio v. United States*, 634 A.2d 1205 (D.C. 1993), the D.C. Court of Appeals adopted *and applied* the comparative analysis methodology to reverse the trial court. *Id.* at 1212. In so doing, the court held that if a comparative analysis resulted in a finding that the seated juror and venirepersons being compared were similarly situated that was *per se* evidence that the reason given for striking one person and not the other was pretextual:

> The presence of black jurors who possess the same characteristics as the eliminated white jurors indicates, at least in the absence of other material differences, that the prosecutor's explanations were pretextual. See *Jones* v. *Ryan*, 987 F.2d 960, 973 (3d Cir. 1993).

Id.

The petition for certiorari cites the *Jones* decision, at page 10, for the view that the Third and Eighth Circuits "share this view" on the role of comparative analysis. However, the petition contends, in urging a grant of certiorari, that the Third and Eighth Circuits are at "one end of the spectrum" from the D.C. Court of Appeals in their approach. Petition at 9. This is an egregious and mystifying misstatement of District of Columbia law. If anything, *Tursio* goes beyond the Third and Eighth Circuits in its requirements. *Tursio*, 634 A.2d at 1212-1213 n. 7 ("We emphasize that the trial court must scrutinize every reason given . . . ").

A three judge panel of the D.C. Court of Appeals, such as the one that heard this case below, is bound by the prior decisions of predecessor three judge panels. *MAP v. Ryan*, 285 A.2d 310, 312 (D.C. 1971). For that

reason petitioners relied heavily on *Tursio*, as binding authority, in their brief and oral argument to the D.C. Court of Appeals.

Their petition to this court marks an abrupt about face. No D.C. case, much less *Tursio*, is cited in their petition. And despite their intimate familiarity with *Tursio* ("The last point, your Honor. But maybe the most important.") and the Third Circuit opinion on which it rests, petitioners now claim that the methodology used by the D.C. Court of Appeals for reviewing peremptory strikes is at the opposite extreme from Third and Eighth Circuit case law.

That is emphatically not the case. *See, e.g., Jefferson v. United States*, 631 A.2d 13, 15 (D.C. 1993) (*Batson* claim "demands the closest possible scrutiny by both the trial court and this court"); *Nelson v. United States*, 649 A.2d 301, 311 (D.C. 1994) (citing *Tursio's* presumption that a reason is pretextual when a comparative analysis results in a finding of disparate treatment of similarly situated venirepersons); *Epps v. United States*, 683 A.2d 749, 753 (D.C. 1996) ("In undertaking a *Batson* inquiry, the trial court must 'rigorously scrutinize[ ] the . . . race neutral explanations' offered to rebut the allegation of discrimination . . . ").

Whether this case had been argued on appeal to the Eighth Circuit or to the D.C. Court of Appeals the result, and method for determining whether the findings of fact were "clearly erroneous," would be the same. *See also Burks v. Borg*, 27 F.3d 1424, 1428 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 1122 (1995) (irrelevant whether appellate court made "comparative analysis" if trial court did, and

appellate court reviewed findings of trial court using "clearly erroneous" standard).

Petitioners' real complaint is not with the method of appellate review, but with the findings that review confirmed.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari to the District of Columbia Court of Appeals should be denied.

Respectfully submitted,

ROY L. PEARSON, JR.
Counsel of Record
Neighborhood Legal Services Program
701 Fourth Street, N.W.
Washington, D.C. 20001
(202) 682-2723

APPENDICES

Juror name Tonya Thompson Juror number 605

Address 1309 West Vir. Ave. NC

Joyner et al. v. Jonathan Woodner Company et al.

JUROR QUESTIONNAIRE

In order to assist the Court and counsel, please fill in the answers to the following questions. Please answer each question to the best of your ability. Remember that you are under oath.

1. Do you have any physical problems that might affect your ability to serve as a juror on this trial? (Circle one)

(No) Yes

2. This trial will last approximately six weeks. Will that cause any special hardship for you? (Circle one)

~~No~~ (Yes)

If yes, what is that hardship?

My Job is short of Help at this time.

3. What is your current occupation and by whom are you employed?

Dental Assistant (Dental Benifit Providers

4. If employed at your current job less than three years, what was your previous occupation?

Dental Assistant (Dr. Cyril ~~Brown~~ Brown DDS

5. If retired or unemployed, from what occupation?

N/A

6. What is your marital status? (Circle one)

married (single) widowed divorced separated

7. If married, what is your spouse's occupation?

N/A

EXAMINATION OF NO. 605

Vol. III at 119(HH)
February, 22, 1989)

THE COURT: The person in place seven is excused.

Next call your attention to the person in place nine, number 605.

MR. DILLON: I note that we would concur with excusing that witness.

THE COURT: Any objection to excusing number 605?

MR. RAUH: None, Your Honor. **(Pg. 119)**

MR. PEARSON: We'll oppose her being excused. The representation is, the job is short of help.

THE COURT: We'll ask number 605 to step forward, please.

Good afternoon. Could you assist us in explaining further what the shortness of assistance is at your job?

THE JUROR: I'm a dental assistant, and right now they do have a shortage of help, but they can always get a temporary if they need it, you know.

THE COURT: **There is no problem for you?**

THE JUROR: **Huh-uh.**

THE COURT: Any other questions of this prospective juror?

MR. WELLS: No.

MR. DILLON: No. **(Pg. 120)**

Juror name Suzanne Wells Juror number 642

Address 532 14th St NE

Joyner et al. v. Jonathan Woodner Company et al.

JUROR QUESTIONNAIRE

In order to assist the Court and counsel, please fill in the answers to the following questions. Please answer each question to the best of your ability. Remember that you are under oath.

1. Do you have any physical problems that might affect your ability to serve as a juror on this trial? (Circle one)

(No) Yes

2. This trial will last approximately six weeks. Will that cause any special hardship for you? (Circle one)

No (Yes)

If yes, what is that hardship?

I am a Supervisor at work & it will be difficult to be off.

3. What is your current occupation and by whom are you employed?

Supervisory Environmental Scientist, EPA, Superfund program

4. If employed at your current job less than three years, what was your previous occupation?

—

5. If retired or unemployed, from what occupation?

—

6. What is your marital status? (Circle one)

(married) single widowed divorced separated

7. If married, what is your spouse's occupation?

Energy consultant

EXAMINATION OF NO. 642 –

Vol. III at 131(HH)
(February 22, 1989)

THE COURT: The person in place 22 is excused.

Next I call your attention to the person in place 6 – place 24, juror 642. Her's is rather generalized. It would be difficult to be off – should we speak with her?

MR. PEARSON: Yes, Your Honor.

MR. WELLS: Yes.

THE COURT: We'd ask juror 642 to step **(Pg. 131)** forward, please. Good Afternoon, Miss Wells.

You indicated to us that it might be difficult for you to serve. What's the nature of your situation?

THE JUROR: Well, I have – I'm in the Superfund program. I'm working on a couple of major rules that we're putting out. We just published a proposed rule in December. I have a national conference I'm supposed to go to the first week in April. I'm scheduled to be in two weeks of supervisory training the second and third week of April. Um, you know, I manage five people right now. I have a lot projects going on.

THE COURT: We've waited a long time for Superfund. Maybe they can wait for us.

MR. RAUH: I'm glad it's still alive.

THE COURT: Are there questions, counsel?

MR. DILLON: None, Your Honor.

MR. PEARSON: Would that affect your ability to be a full-time, and pay attention to a trial of this length?

THE JUROR: I mean, you really have to be here every day for six weeks? **(Pg. 132)**

MR. PEARSON: At a minimum.

THE JUROR: I mean, I know you're here from. Everybody, it's hard to be away from your job, and it would be difficult. That's for sure. Just like any of you missing six weeks of work, it would be the same way. You know, I feel like I have a responsible job at work. But I'm sure a lot of other people do too.

THE COURT: Are there further questions from counsel?

MR. PEARSON: None, Your Honor.

THE COURT: Thank you.

Counsel wish to be heard?

MR. DILLON: Your Honor, I believe what she has indicated sufficient cause to strike her.

THE COURT: We'll leave that for the exercise of counsel's discretion.

Number 6 –

MR. DILLON: I have indicated, your Honor, and we would be agreeable to striking due to that.

MR. PEARSON: On 642, she indicated in one of her responses that she believed in replacing minority residents. Caveat, if they are compensated. We would suggest that is cause for **(Pg. 133)** excluding her.

THE COURT: 642 will be left to counsel's discretion. We're now on 644. 644 indicated that she has Jehovah's Witness activities. Inquiry or may she be excused? **(Pg. 134)**

EXAMINATION OF NO. 631 –

Supp. R. #5 at 5
(February 23, 1989)

MR. PEARSON: Your Honor, I did have potential questions about two of the jurors that may require – just those two exceptions that they be called forward and the judgment of the court the questions I raise are serious enough to warrant it.

THE COURT: Which numbers?

MR. PEARSON: Juror number 631, made a statement in his jury questionnaire regarding a special hardship. I don't recall that he was called to the bench, however, on yesterday, and said that he was under congressionally mandated deadlines to do research on national defense. He worked with the –

THE COURT: Well, I know we did not speak with him. The Court noted that he's an analyst at the Library of Congress which sounds like more of what we heard from those government offices. But I will be willing to ask him questions.

MR. PEARSON: Because he said it would raise national defense –. **(Pg. 5)**

MR. WELLS: Probably screening documents for the North Trial.

MR. PEARSON: I would request that he be questioned on that. . . . **(Pg. 6)**

THE COURT: Mr. Pearson? Do you have challenges for cause?

MR. PEARSON: We'll not have an opportunity to inquiry of 631 before exercising –

THE COURT: First let's do challenges for cause then I will bring all the jurors back in. We'll talk to the four – five we have to talk to and then you can deal here at the bench. I think we'll be more comfortable if we deal with the challenges for cause here without the jurors possibly overhearing us or the difficulty of hearing ourselves here at the bench.

MR. PEARSON: Well, as challenges for cause, we would challenge juror 631 for the reasons given that he at least perceives that he will not be able to, not be available to give his full-time and attention to the trial of this case because of his work obligations related to national defense.

THE COURT: You may inquire. Is there **(Pg. 10)** objection to cause?

MR. RAUH: Yes, Your Honor.

THE COURT: All right. We'll make inquiry of him then. . . . **(Pg. 11)**

* * *

THE COURT: Let me first say good morning members of the panel. Thank for your returning today. I know that some of you have returned with some difficulty. As you can hear, I am present here myself with some difficulty. But we are particularly grateful to you jurors to have – for your efforts to return and to assist us in selecting a jury to assist these parties in resolving their differences.

There are four of your number who appear to be absent. The Court would notify counsel that we are seeking the following persons: Place nine, place 18, place 28, and place 46. We'll wait a few minutes more to see if they respond.

We'll ask that the clerk also have them called at home. . . . **(Pg. 23).**

* * *

THE COURT: Thank you, sir. Is juror 631 available? Juror 631.

Mr. Roman, there was a request for further inquiry in light of your job situation. **(Pg. 34).**

THE JUROR: Yes.

THE COURT: What is your situation?

THE JUROR: Well, I spoke to my –

THE COURT: Library of Congress.

THE JUROR: Congressional research. I spoke to my supervisors this morning. It's primarily given the new Congress and the new administration, and I'm the only individual that handles specific areas of the defense budget. They wanted to request that I be excused at this time. We went through the process to – we found this morning that we'll have to go through the librarian in order to make an official request, though they offered the opportunity to contact my division chief or assistant chief to talk to them concerning the work load. But it's primarily the fact I'm the only one that works in conventional

military balancing and chemical weapons and arms control, and at this point, we are deluged. It's a matter of the length of the six weeks would create a problem.

THE COURT: Really think the Library of Congress they can read the brochure.

THE JUROR: Pardon?

THE COURT: It tells you if you have **(Pg. 35)** difficulty serving, how to deal with the system by making an application with a promise to serve at another time. Did you read it?

THE JUROR: Pardon me?

THE COURT: Did you read your notice?

THE JUROR: Well, I didn't know at the time that the duty would be for six weeks, you know. A week we could get by, but for six weeks during this part of the budget cycle, that is what creates the problem.

THE COURT: Questions, counsel?

MR. PEARSON: No, Your Honor.

MR. WELLS: No, Your Honor.

THE COURT: Thank you.

MR. PEARSON: Your Honor, I will note that we haven't been informed the jurors of the possibility of there being two parts of this trial and it going well beyond six weeks. **(Pg. 36)**

* * *

THE COURT: Next I would call your attention to the person in place 631. Parties wish to be heard?

MR. PEARSON: Your Honor, he clearly is **(Pg. 38)** [im]proper in the case of this kind of – given the sensitive nature of his work and indispensable of his sole position and a sensitive position. He's obviously indicating his unavailability for trial because of the length of this which is in excess of six weeks. He's now attempting through his employer to also get whatever documents necessary to get off the jury. Clearly I think both sides will be ill served by forcing him to not only serve six weeks but potentially two to three months.

MR. WELLS: Just as Court was able to round that personnel for xeroxing and for preparation of these questionnaires yesterday, I would think that the United States Government could make do with the absence of one individual.

THE COURT: The Court denies the challenge for cause. There was no showing that his work would interfere with his ability to be fair.

Next I would inquire –

MR. PEARSON: We didn't have a opportunity to ask him that question.

THE COURT: That's what he was here for.

THE COURT: Court next inquires about **(Pg. 39)** number 684.

* * *

[Number 684 is excluded, by agreement, and there is no motion as to number 698]

* * *

MR. PEARSON: Your Honor, we would ask leave to ask that question of 631. I thought it was forgone when he indicated the extraordinary lengths he already had gone to to try to get off the jury.

THE COURT: The Court will leave the matter to counsel's discretionary peremptory **(Pg. 40)** challenge.

PEREMPTORY STRIKES

February 23, 1989

MR. PEARSON: Your Honor, all nine plaintiffs have a total of three challenges, all three defendants will have a total of three challenges cumulative?

THE COURT: Correct. As to the first six, and then you have a challenges as to alternates.

MR. PEARSON: Three a piece.

THE COURT: Correct. First challenge?

MR. PEARSON: It would be to juror 631.

THE COURT: Place 18, number 631. That is one challenge.

MR. DILLON: Defense would strike juror number 597 in seat 8.

THE COURT: That's number 597, place 8.

MR. PEARSON: 642, seat 24.

THE COURT: Second challenge is 642 in place number 24.

MR. DILLON: Defense would strike juror number 627 located in seat 17.

THE COURT: Defense number two, seat 17, number 627.

MR. PEARSON: 652, seat 27.

THE COURT: Plaintiff's number three, 652, **(Pg. 42)** place 27.

MR. DILLON: Defense would strike juror number 658 located in seat 30.

MR. RAUH: Seat 30.

MR. DILLON: Yes.

THE COURT: Defense number three as to juror 658 in place 30, is that correct?

MR. DILLON: That's correct.

MR. PEARSON: Will the Court now call them to be seated or do we continue?

THE COURT: You may continue with your challenges.

MR. PEARSON: These are for the alternates?

THE COURT: Yes.

MR. PEARSON: And the jurors in the case are jurors 605, 608, 609, 612, 635, and 649.

THE COURT: Those are the first six that remain.

MR. PEARSON: They cannot be stricken?

THE COURT: Strike anyone you want.

MR. PEARSON: I thought we're now striking for alternates.

THE COURT: We've completed the three primary challenges. But no one asked us to **(Pg. 43)** prevent you from challenging anyone you wish on the list.

MR. PEARSON: So we don't know who the alternates are going to be?

THE COURT: They are the next six that remain when we finish exercising the challenges.

MR. PEARSON: 665, seat number 33.

THE COURT: Plaintiff's first challenge to alternate is number 665, place 33.

MR. DILLON: Defense would strike juror number 659 located in seat number 31.

THE COURT: Defense first alternate challenge is in seat 31, 659.

MR. PEARSON: 681 in seat 40.

THE COURT: Defense – I'm sorry. Plaintiff challenges 681 in seat 40.

That's plaintiff's alternate challenge number two.

MR. DILLON: Juror number 671, seat 35.

THE COURT: Defense alternate challenge two is to the person in seat 35, number 671.

MR. PEARSON: 690, seat 45.

THE COURT: Plaintiff's alternate challenge number three is to juror 690 in seat 45. **(Pg. 44)**

MR. DILLON: Your Honor, defense's third alternate would strike juror number 612 located in seat 13.

THE COURT: I'm sorry?

MR. DILLON: Juror number 612 located in seat 14.

THE COURT: These persons are our primary jurors. Now we strike alternates.

MR. DILLON: Okay. Is this – Oh, 612 remains.

THE COURT: Yes.

MR. DILLON: Defense would strike juror number 675 located in seat 37.

THE COURT: Defendant's alternate number three is to number 637 in seat 37.

THE COURT: Mr. Dillon, just so you don't misunderstand, as you're aware, the Court of Appeals holds that counsel must know who the alternates are when they exercise alternate challenges. However, when you are striking as to the primary ones, you don't have to waste a challenge if you don't want to use it to the primaries. You can challenge anywhere on the list on the first round until you come to the alternate. **(Pg. 45)**

Supreme Court, U.S.
FILED
FEB 3 1997
CLERK

Nos. 96-821 & 96-997

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

THE JONATHAN WOODNER CO., THE ESTATE OF JONATHAN WOODNER, AND STEVEN Z. LAUFER,

Petitioners,

v.

FRANCISCA BREEDEN, *et al.*,

Respondents.

On Petitions for a Writ of Certiorari to the District of Columbia Court of Appeals

REPLY BRIEF FOR PETITIONERS

B. MICHAEL RAUH
MARTIN SHULMAN
MANATT, PHELPS & PHILLIPS L.L.P.
1501 M Street, N.W.
Suite 700
Washington, D.C. 20005
(202) 463-4300

Counsel for Petitioner
The Estate of Jonathan Woodner

GREGORY K. WELLS
SMALLWOOD & WELLS, P.A.
1801 McCormick Drive
Suite 160
Largo, MD 20774
(301) 925-2000

Counsel for Petitioner
Steven Z. Laufer

WALTER A. SMITH, JR.*
STEPHEN G. VASKOV
JONATHAN S. FRANKLIN
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5728

JOHN J. DILLON
MONTEDONICO, HAMILTON & ALTMAN, P.C.
5301 Wisconsin Avenue, N.W.
Suite 400
Washington, D.C. 20015
(202) 364-1434

Counsel for Petitioner
The Jonathan Woodner Co.

* Counsel of Record

13 pp

TABLE OF CONTENTS

	Page
I. THE COURT SHOULD RESOLVE THE CONFLICT OVER THE PROPER USE OF COMPARATIVE ANALYSIS UNDER *BATSON*.....	1
II. THE COURT SHOULD RESOLVE THE CONFLICT OVER WHETHER THE SEVENTH AMENDMENT PERMITS A PARTIAL RETRIAL LIMITED TO PUNITIVE DAMAGES.....	5
CONCLUSION	10

TABLE OF AUTHORITIES

Page

CASES:

Atkinson v. *Dixie Greyhound Lines, Inc.*, 143 F.2d 477 (5th Cir.), *cert. denied*, 323 U.S. 758 (1944)..... 9

Brink's Inc. v. *City of New York*, 717 F.2d 700 (2d Cir. 1983)..... 9

Burke v. *Deere & Co.*, 6 F.3d 497 (8th Cir. 1993), *cert. denied*, 510 U.S. 1115 (1994)..... 10

Grimm v. *Leinart*, 705 F.2d 179 (6th Cir. 1983), *cert. denied*, 465 U.S. 1066 (1984)..... 9

John Hancock Mutual Life Insurance Co. v. *Bartels*, 308 U.S. 180 (1939)..... 2

Maxey v. *Freightliner Corp.*, 727 F.2d 350 (5th Cir. 1984)..... 9

Missouri v. *Jenkins*, 495 U.S. 33 (1992)..... 7

Robertson Oil Co. v. *Phillips Petroleum Co.*, 871 F.2d 1368 (8th Cir. 1989)..... 9

Robertson Oil Co. v. *Phillips Petroleum Co.*, 14 F.3d 373 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 2120 (1994)..... 10

Scarborough v. *United States*, 431 U.S. 563 (1977)..... 2

Smith v. *Lightning Bolt Productions, Inc.*, 861 F.2d 363 (2d Cir. 1988)..... 9

Williams v. *Armontrout*, 977 F.2d 437 (8th Cir. 1992).. 9

CONSTITUTIONAL PROVISION:

U.S. Const., amend. VII ..... *passim*

RULE:

Sup. Ct. R. 13.3 6

REPLY BRIEF FOR PETITIONERS

This is a racially-charged case in which respondents' counsel, representing all-black plaintiffs against all-white defendants, struck all potential white jurors, made unfounded charges of racism against the defendants in front of the resulting all-black jury, and then induced that jury to return a substantial punitive damages award that was completely unsupported by the evidence. Because of that lack of support, the Court of Appeals set the punitive award aside. Nevertheless, that court summarily rejected our claim that under *Batson* the entire jury verdict was infected by racism and should be set aside. Worse, even though the court ordered a new trial on punitive damages, it rejected our contention that because precisely the same evidence underlies the compensatory damages claims as underlies any request for punitive damages, a retrial limited solely to punitive damages contravenes the Seventh Amendment.

Significantly, respondents' counsel does not seriously challenge that the lower courts are deeply divided over the *Batson* and Seventh Amendment questions presented by our petitions. Neither does he dispute that these two constitutional questions are frequently recurring and that their resolution is important to the fair administration of justice in the Nation's courts. Instead, respondents' counsel contends that the two questions are somehow not presented by this case. As we will show, however, his contentions are based on distortions and misrepresentations of the record, and the Court should not allow his contentions to detract from the compelling case for certiorari presented here.

I. THE COURT SHOULD RESOLVE THE CONFLICT OVER THE PROPER USE OF COMPARATIVE ANALYSIS UNDER *BATSON*

1. Respondents' principal answer to our *Batson* petition is that we are merely asking this Court to overturn the trial court's factual findings as "clearly erroneous."

See Opp. (96-821) at 11-12. That is not so. As respondents concede, "petitioners have attacked the *method* used by the District of Columbia Court of Appeals to determine whether a trial court's findings of fact are clearly erroneous." *Id.* at 12 (emphasis supplied). The central question presented here is not whether the trial court's findings are clearly erroneous, but whether the courts below applied an incorrect legal standard—which ignores the role of comparative analysis—to evaluate counsel's explanation for his apparently racially-based strikes. That is a question of law, and one that divides the lower courts and now merits this Court's review.

2. Respondents contend that the conflict in the lower courts is "irrelevant" here because the Court of Appeals purportedly applied the stringent *per se* rule of comparative analysis to petitioners' claims. *Id.* at 12-16. But respondents do not and cannot support this assertion with the Court of Appeals' decision in *this* case. Regardless of that court's conflicting decisions in *other* cases, the court clearly did *not* apply a comparative analysis to evaluate petitioners' claims in this case. *See* Pet. App. (96-821) at 6a n.5. Moreover, where, as here, there is a conflict among the decisions of various courts, the existence of an additional conflict among the decisions of a single court is a further factor supporting this Court's review. *See, e.g.*, *Scarborough* v. *United States*, 431 U.S. 563, 567 n.4 (1977); *John Hancock Mut. Life Ins. Co.* v. *Bartels*, 308 U.S. 180, 181 (1939).

3. Respondents finally argue that even if the courts below had applied a rigorous comparative analysis, the behavior of respondents' counsel would have been sustained under *Batson*. *See* Opp. (No. 96-821) at 9-11. To support this argument, respondents make two new factual assertions that they raise for the first time in their brief to this Court. First, they assert that one of the black venirepersons (No. 605) whom the trial court found to be similarly situated to the stricken whites was not really similar because she "formally withdrew" her hardship

claim. *Id.* at 2, 10. Second, respondents imply that counsel would have used his final peremptory challenge to strike the second black venireperson whom the trial court found to be similarly situated (No. 627), if only petitioners had not struck him themselves. *Id.* at 3, 9-10.

As shown below, neither of these belated assertions is supported by the record. More significantly, however, under *Batson* and its progeny counsel was required to make these kinds of assertions to the *trial court* so that court could assess their credibility contemporaneously with the challenged strikes. Here, counsel did not make either of his current assertions either to the trial court or even to the Court of Appeals. And the mere fact that it has taken counsel nearly eight years to conjure up these assertions serves to underscore that the purportedly "neutral" explanations that counsel gave at the time of his challenges were, in fact, pretextual.

Indeed, the record plainly confirms that counsel's new assertions are complete afterthoughts that cannot withstand a comparative analysis. The claim that No. 605 (who sat on the primary jury) was not similarly situated to the stricken whites because she "formally withdrew" her claim of hardship is refuted by the trial court's own findings. Comparing No. 605 to No. 642, the white female struck by counsel, the trial court noted that both gave nearly identical responses when questioned about their claims of employment hardship:

> One of the black women [No. 605] indicated to us that indeed she guessed she could make it; they could find somebody. Likewise, the white wom[a]n who was struck [No. 642] indicated that while it was a hardship, they could manage, and that [a lot] of people faced hardships.
>
> On the basis of that explanation and the data that the Court has before it, *it is hard pressed to find an explanation other than race* for selecting two women, both relatively young, both of whom first

> expressed some difficulty and then indicated they could manage.

Pet. App. (96-821) at 60a (emphasis supplied). This similarity between these two jurors, and the failure of the courts below to justify approving counsel's disparate treatment of them, is itself sufficient reason to grant certiorari to resolve the conflict on the question presented.

The record, however, also belies counsel's new-found suggestion that he would have stricken the other similarly-situated black venireperson (No. 627) identified by the trial court. First, the trial court initially proposed that *all* venirepersons who had answered "yes," to the first two questions on their questionnaires, which inquired about hardships (*see* Opp. App. (96-821) at 1a, 4a) be excused for cause, but respondents' counsel opposed that suggestion. *See* Feb. 22, 1989 Tr. (9:30 a.m.) at 118-19 (R. HH). Then, of the four venirepersons found by the trial court to have expressed similar job concerns, counsel challenged *only* the two whites for cause, specifically *opposing* petitioners' motions to remove No. 627 (whom counsel now implies he would have peremptorily challenged) as well as to remove No. 605. *Id.* at 127-28, 119-20. And even after counsel's challenges for cause were denied, counsel specifically recalled the two whites—but not the similarly-situated blacks—for further questioning and renewed his challenges for cause against them. *See* Feb. 23, 1989 Tr. (10:12 a.m.) at 10-11 (Supp. R. #5). Finally, counsel could have, but did not, strike No. 627 with his first two peremptory challenges, striking white venirepersons instead.

In the face of this record, counsel's newly-discovered rationales for his behavior are plainly untimely and in any case ring hollow. More importantly, even if those arguments had been presented to the courts below, they would not have justified counsel's disparate treatment under the rigorous comparative analysis of *prima facie* race-based strikes endorsed by courts in other jurisdic-

tions.[1] The conflict is thus squarely presented by this case and should be resolved by this Court.

II. THE COURT SHOULD RESOLVE THE CONFLICT OVER WHETHER THE SEVENTH AMENDMENT PERMITS A PARTIAL RETRIAL LIMITED TO PUNITIVE DAMAGES

1. Respondents devote nearly the whole of their opposition in No. 96-997 to arguing that our Seventh Amendment claim is untimely and was not raised below. Neither argument is correct. They argue that we were obligated to raise the claim in a petition from the Court of Appeals' original September 14, 1995 decision, because the court's later August 8, 1996 order merely "elaborated" on its reasons for deciding the question in its earlier ruling. *See* Opp. (96-997) at 1, 6. In fact, the September 14, 1995 opinion nowhere even addressed the question. Indeed, the later August 8 order was issued in response to *respondents'* own motion, filed after the 1995 opinion, that the court authorize execution on the judgment for compensatory damages, a motion petitioners expressly opposed on the ground that such execution would contravene their Seventh Amendment rights. Thus, in the August 8 order, the court for the first time "turn[ed] to the . . . question" whether "a retrial on the sole issue of punitive damages [would] be unfair to [petitioners]." Pet. App. (96-997) at 5a. Noting that it "would ordinarily leave it to the trial court, in the first

---

[1] Significantly, respondents nowhere justify the second prong in counsel's race-based strategy—his unsupported charges of racism before the all-black jury. Without identifying any record support, respondents merely state that the charges were justified by the jury's verdict on petitioners' counterclaim for libel based on a sign that was hung outside a plaintiff's window. *See* Opp. (96-821) at 11. But respondents' defense at trial was *not* that the sign spoke the "truth"; rather, respondents' *own* testimony was that the sign was directed to racism *in general*, and was not meant to charge petitioners with racism. *See* Mar. 1, 1989 (2:10 p.m.) Tr. at 53 (R. WW); Mar. 3, 1989 (10:35 a.m.) Tr. at 19-20, 24-25 (R. FFF); Mar. 6, 1989 (3:50 p.m.) Tr. at 28-29 (R. JJJ).

instance, to pass on that point," *id.*, the court nevertheless decided the question itself. *Id.* at 6a-7a. Petitioners thereafter sought review of that decision in this Court, following the Court of Appeals' denial of rehearing.

2. Respondents assert, however, that our petition for rehearing of the August 8 order did not toll the time for petitioning for certiorari from that order. This too is wrong. Under this Court's rules, "the time to file a petition for certiorari runs from the date of the judgment or order sought to be reviewed," but "if a petition for rehearing is timely filed in the lower court by any party," the time to file the petition for certiorari runs from the denial of the petition for rehearing. Sup. Ct. R. 13.3.[2]

Respondents nevertheless argue that our petition for rehearing was not authorized by the Court of Appeals' own rules. *See* Opp. (96-997) at 9-10. But they fail to inform this Court that the Court of Appeals itself rejected that very argument. On August 2, 1996, the court erroneously allowed its mandate to issue prior to its August 8 order. Petitioners then moved the court to recall that mandate pending resolution of the petition for rehearing of the August 8 order. On September 6, 1996, the court held that its mandate had been issued in error, recalled the mandate, and stayed it "pending resolution of the rehearing petition before the court." Order of September 6, 1996. Then, on September 16, the court ordered respondents to file a response to the rehearing petition, necessarily rejecting respondents' express contention that no petition for rehearing was authorized. *See* Appellees' Statement Regarding Appellants' Motion to Recall August 2, 1996 Mandate and to Stay Execution

---

[2] A petitioner, of course, cannot avoid the time constraints by filing successive petitions for rehearing from the *same* judgment or order. But if, as here, a lower court elects to issue successive judgments or orders, each of which is subject to a petition for certiorari, then Rule 13.3 provides that a timely filed petition seeking rehearing of each order will toll the filing period for the petition for certiorari from that order.

at 1-2 (filed Sept. 13, 1996). The court then considered the petition on its merits, denying it over the dissent of one judge who would have granted rehearing. *See* Pet. App. (96-997) at 9a. Thus, contrary to respondents' current contentions, the Court of Appeals necessarily ruled that the petition for rehearing was proper, and that court's construction of its own rules regarding rehearing petitions should be found controlling here. *See Missouri* v. *Jenkins*, 495 U.S. 33, 50 (1992).

It is true that the Court of Appeals, by issuing two successive rulings in this case, has created an unusual procedural posture requiring two petitions raising different constitutional questions. But petitioners have timely presented those questions in full compliance with this Court's rules and should not be prejudiced by the Court of Appeals' decision to issue two separate rulings.[3]

3. Respondents next misrepresent the record by asserting that the Seventh Amendment question was not even raised below. As noted, petitioners raised that issue in response to respondents' motion requesting immediate execution on compensatory damages. Before then, there was no need for petitioners to raise the issue, because—as the court itself recognized in its August 8 order—that question would ordinarily have been left to the trial court to decide on remand. *See* Pet. App. (96-997) at 5a. Thus, petitioners opposed respondents' motion in part because "on remand in this case the trial court would have to determine as an initial matter whether a trial could fairly be limited to the issue of punitive

---

[3] Respondents contend that our second petition is untimely because if we do not prevail on our *Batson* claim, "this Court . . . will be unable to provide defendants with any meaningful relief." Opp. (96-997) at 9. This contention has nothing to do with the timeliness of our petition, and is mistaken in any event. The Court of Appeals' mandate has been stayed pending resolution of the petitions for certiorari, and execution on the judgment has been stayed by a supersedeas bond. Thus, respondents cannot execute on any judgment until the proceedings in this Court are completed.

damages alone."[4] Then, after the court addressed the issue in its August 8 order, petitioners argued in their rehearing petition that "a retrial limited to punitive damages would violate the Seventh Amendment right to a jury trial where, as here, the evidence underlying the compensatory and punitive awards is overlapping."[5] Thus, the question presented by the present petition—whether the Seventh Amendment permits a partial retrial limited to punitive damages in this case—was presented to the Court of Appeals at the earliest opportunity, and was considered and decided by that court. The question is therefore properly before this Court.

4. Finally, when they reach the merits of the Seventh Amendment issue, respondents argue that the question does not involve a legal determination at all, and that the lower courts have in fact uniformly rejected our position. Respondents, once again, are wrong.

The *Gasoline Products* inquiry requires an examination of the intertwining of the evidence relating to the issues sought to be tried separately. However, as shown

---

[4] Appellants' Opposition to Appellees' Emergency Motion for Issuance of Mandate to Permit Execution on Judgment for Compensatory Damages at 5 (filed Oct. 31, 1995).

[5] Appellants' Petition for Rehearing or for Rehearing En Banc of the Panel's August 8, 1996 Order at 2 (filed Aug. 22, 1996). *See also id.* at 2 (decision "departs from controlling Supreme Court precedent (*Gasoline Products*) on the important question of when the Seventh Amendment precludes a limited retrial"); *id.* at 7 ("The panel's authorization of a limited retrial and an execution on tort damages is therefore in direct conflict with the *Gasoline Products* decision and violates defendants' Seventh Amendment rights"). Petitioners also argued alternatively, in a footnote, that the Court of Appeals' decision to address the question itself rather than leave it for the trial court on remand was "puzzling," primarily because there were trial judges who were familiar with the case. *Id.* at 7 n.3. Contrary to respondents' suggestions, this footnote was plainly an alternative argument, as petitioners principally contended that the August 8 decision contravened the Seventh Amendment as a matter of law.

by this case and those cited in our petition, due to the very nature of a punitive damages request, the evidence on that question is *necessarily* intertwined with the evidence underlying liability for compensatory damages such that a partial retrial would violate the Seventh Amendment. While it may be possible to imagine a hypothetical case in which a second jury hearing only punitive damages issues would not improperly re-examine issues considered by the first,[6] neither this case nor any cited by respondents is such a case.

Respondents nevertheless contend that the circuit courts have uniformly rejected our position (*see* Opp. (96-997) at 19-20), and in doing so they completely misrepresent the very cases upon which they rely. Eleven of their seventeen cited cases, while generally remanding for a new trial on punitive damages, did not reach or discuss the Seventh Amendment issue in any way.[7] Moreover, those cases are fully consistent with our position that a party may elect not to assert its Seventh Amendment right to a retrial on all issues. The remaining cases,[8] although supporting respondents' position, merely underscore the conflict on the question presented; for those cases certainly do nothing to change the fact that other circuits have ruled the other way on the issue, in support of the Seventh Amendment claim

---

[6] For example, there could theoretically be a case (unlike this one) where the first jury issued extensive special verdicts on factual issues that obviate the need for the second jury to reconsider that evidence.

[7] One case, *Brink's Inc.* v. *City of New York*, 717 F.2d 700 (2d Cir. 1983), did not remand for a new trial at all.

[8] *Williams* v. *Armontrout*, 977 F.2d 437 (8th Cir. 1992); *Robertson Oil Co.* v. *Phillips Petroleum Co.*, 871 F.2d 1368 (8th Cir. 1989) ("*Robertson I*"); *Smith* v. *Lightning Bolt Productions, Inc.*, 861 F.2d 363 (2d Cir. 1988); *Maxey* v. *Freightliner Corp.*, 727 F.2d 350 (5th Cir. 1984); *Grimm* v. *Leinart*, 705 F.2d 179 (6th Cir. 1983), *cert. denied*, 465 U.S. 1066 (1984); *Atkinson* v. *Dixie Greyhound Lines, Inc.*, 143 F.2d 477 (5th Cir.), *cert. denied*, 323 U.S. 758 (1944). The *Smith* case was cited in our petition.

made here. When these cases are considered with those cited in our petition (at 8 n.8), four circuits (the Third, Fourth, Ninth and Tenth) hold that the Seventh Amendment precludes a partial retrial limited to punitive damages, two circuits (the Second and the Sixth) hold to the contrary, and two circuits (the Fifth and the Eighth) have issued conflicting opinions on the subject, with the later opinions from those circuits supporting our view.[9] Thus, far from demonstrating uniformity in the lower courts, the cases cited by respondents further confirm that the question is a frequently recurring one that has sharply divided the lower courts.

CONCLUSION

For the foregoing reasons and the reasons set forth in the petitions, the petitions should be granted.

Respectfully submitted,

WALTER A. SMITH, JR.*
STEPHEN G. VASKOV
JONATHAN S. FRANKLIN
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5728

Counsel for Petitioners

* Counsel of Record

---

[9] In *Robertson Oil Co.* v. *Phillips Petroleum Co.*, 14 F.3d 373 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 2120 (1994)—an *en banc* rehearing after remand from *Robertson I*—four judges dissented on the grounds that the earlier decision authorizing a partial new trial had "disregarded applicable law" and should be reversed in light of this Court's recent punitive damages jurisprudence. *Id.* at 392-93 (Beam, J., dissenting). The majority believed that the law of the case prevented it from reopening the prior decision (*id.* at 376 n.5), but recent circuit precedent precludes such partial retrials. *See Burke* v. *Deere & Co.*, 6 F.3d 497, 513-14 (8th Cir. 1993), *cert. denied*, 510 U.S. 1115 (1994).